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In the Supreme Court of the United States

OCTOBER TERM, 1999

RAFFENSPERGER, HUGHES & CO., INC.,
BARNES & THORNBURG, AND CATHERINE L. BRIDGE,

Petitioners,

v.

VIRGINIA E. BROUWER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

ROGER L. TAYLOR
THOMAS E. DUTTON
JILL C. ANDERSON
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Petitioner Raffensperger, Hughes & Co.

PHILIP ALLEN LACOVARA
Counsel of Record
JAMES D. HOLZHAUER
MIRIAM R. NEMETZ
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioners Barnes & Thornburg and Catherine L. Bridge

Additional Counsel Listed on Inside Cover

---

10 pp

WILLIAM P. WOODEN
MARY TITSWORTH CHANDLER
Wooden & McLaughlin, LLP
1600 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

LAUREN J. ROSENBLUM
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019

Additional Counsel for Petitioners
Barnes & Thornburg and Catherine L. Bridge

QUESTION PRESENTED

Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO") makes it unlawful for "any person employed by or associated with an enterprise * * * to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." In *Reves* v. *Ernst & Young*, 507 U.S. 170, 179-85 (1993), this Court ruled that a person — including an outside service provider such as an accountant or lawyer — cannot be held liable for violating Section 1962(c), unless he personally "has participated in the *operation* or *management* of the enterprise itself" (emphasis added).

In the present case, however, the Seventh Circuit created liability for such outsiders under RICO's "conspiracy" provision, Section 1962(d), even if the outsiders have neither participated in operating or managing the corrupt enterprise nor *agreed* to do so. Instead, the court ruled that a law firm or other outsider may be held liable for *conspiring* to violate Section 1962(c) simply upon a showing that the firm "knowingly agree[d] to perform services of a kind which facilitate[d] the activities of those who [were] operating the enterprise in an illegal manner."

This Petition presents the following question as to which there is an explicit conflict among six circuits:

> May a person be held liable, under Section 1962(d) of RICO, for conspiring to violate Section 1962(c) even though he has not agreed to participate personally in operating or managing the affairs of the corrupt enterprise and, therefore, is in the class of persons excluded from Section 1962(c) liability under *Reves*?

RULE 14.1 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Seventh Circuit:

1. Virginia E. Brouwer
2. Wesley Baxter
3. Alberta E. Haessig
4. Hardy Hicks, Jr.
5. Natalie Hicks
6. Gerald J. Moss
7. Viola Robinette
8. June Yost
9. Ruth Wilcher
10. Raffensperger, Hughes & Company, Inc. (a financial services company)
11. Catherine L. Bridge
12. Barnes & Thornburg (a law firm)

RULE 29.6 STATEMENT

Raffensperger, Hughes, & Co., Inc. is a wholly-owned subsidiary of Associated Group, Inc. The shares of Associated Group, Inc. are not publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Raffensperger, Hughes, and Company, Inc. ("Raffensperger"), the law firm Barnes & Thornburg ("B&T") and one of its partners, Catherine L. Bridge, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is published at 199 F.3d 961. App. 1a-13a. The district court's opinion and order granting Raffensperger's motion to dismiss is unpublished. App. 14a-25a. The district court's opinion and order denying plaintiffs' motion to reconsider the dismissal of their claims against Raffensperger is unpublished. App. 26a-39a. The district court's opinion and order granting summary judgment to B&T and Bridge is unpublished. App. 40a-59a. The district court's opinion and order denying plaintiffs' motion to reconsider the grant of summary judgment to B&T and Bridge and again to reconsider the dismissal of claims against Raffensperger is unpublished. App. 60a-65a.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2000. Accordingly, a petition for a writ of certiorari is due no later than April 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1962(c) provides:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(d) provides:

> "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

INTRODUCTION

This case concerns the circumstances under which outside professionals and others providing services to an allegedly corrupt enterprise may be held liable under RICO. Resolving a conflict among the circuits, this Court ruled in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), that a person — there, a firm of accountants — cannot be liable under Section 1962(c) unless he personally participated in "operating" or "managing" the enterprise. This ruling eliminated the RICO exposure of true "outsiders" who are accused merely of facilitating the illegal operation of an enterprise.

The extent to which such persons may be liable for *conspiring* to violate Section 1962(c), however, has continued to divide both the courts and commentators. This Court's recent decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), has resulted in increased confusion. In *Salinas*, the Court ruled that RICO's conspiracy provision, Section 1962(d), does not require an agreement by each conspirator to commit personally the two predicate acts that are necessary elements of a substantive Section 1962(c) violation. *Salinas* did not address the "operation or management" test at all and did not purport to limit *Reves*. It concerned the liability of a defendant who plainly *was* an "operator or manager." Nonetheless, the Court's rationale has led some courts to conclude that one can be liable for conspiracy to violate Section 1962(c) without agreeing personally to operate or manage the enterprise. This interpretation allows claimants to circumvent the constraints that *Reves* imposed on the reach of Section 1962(c) simply by asserting a claim of *conspiracy* to violate that section.

STATEMENT

This case squarely frames the tension between *Reves* and *Salinas*, which as we shall explain has divided the circuits. Here noteholders whose investments had lost much of their value after the issuer entered bankruptcy sought to recoup their losses by seeking treble damages under RICO from everyone in any way involved with the relevant transactions. Among those sued were petitioners Raffensperger, an investment banking firm, and B&T and Bridge (collectively, "B&T"), a law firm and a partner in that firm. Plaintiffs alleged that Raffensperger and B&T had both violated and conspired to violate Section 1962(c).

The district court dismissed Raffensperger from the action and granted summary judgment to B&T. Relying on *Reves*, the court held that neither could be liable under Section 1962(c) or for conspiracy to violate that section because they neither had participated in operating or managing the alleged RICO enterprise nor had agreed to do so. Plaintiffs appealed only with respect to their conspiracy claims and without disputing the facts as found by the district court. The Seventh Circuit ruled that the district court had applied the wrong standard to the conspiracy claims. Stating that it was "trying to reconcile" *Reves* and *Salinas*, it held that a defendant need *not* participate or agree to participate personally in managing or operating the enterprise in order to be liable for conspiring to violate Section 1962(c). The court declared that conspiracy liability may be based on a showing that an outsider "knowingly agree[d] to perform services of a kind which facilitates the activities" of those operating the enterprise.

1. ***Raffensperger's and B&T's peripheral connection with the RICO enterprise.*** The court of appeals accepted the facts as found by the district court. App. 2a. This case arose from the financial difficulties and subsequent bankruptcy of Firstmark Corporation, a holding company whose subsidiaries engaged in various financial services. App. 3a. According to plaintiffs, after Firstmark began experiencing financial trouble in the

1980's, certain defendants devised a "pyramid scheme" whereby Firstmark would keep up with required payments of interest and principal on outstanding notes by selling additional notes and encouraging investors to refrain from redeeming notes upon maturity. *Ibid.*

Raffensperger and B&T each became peripherally involved with Firstmark after the alleged scheme was already well underway. Raffensperger served as Qualified Independent Underwriter ("QIU") in connection with Firstmark's issuance of Series F Notes. App. 15a. Later, it assisted in the sale of Firstmark's assets at the request of Firstmark's bankruptcy counsel. *Ibid.* According to the district court, plaintiffs' allegations were "insufficient to suggest that Raffensperger had infiltrated Firstmark or had participated in the operation [or] management of Firstmark." App. 19a.

For its part, B&T acted as outside counsel to Raffensperger when it served as QIU. App. 48a-50a. Later, B&T provided legal services to Firstmark in connection with its preparations for issuing Series A subordinated notes. App. 52a-53a. Finally, B&T represented another client, Capitol Securities, in the purchase of Firstmark shares. App. 50a-51a. According to the district court's findings (which were not challenged by the plaintiffs on appeal), there was no evidence that, in any of these roles, B&T and Bridge "served as anything more than outside counsel." App. 46a.

2. ***District court proceedings.*** After Firstmark filed for bankruptcy, the noteholders filed a RICO class action against those involved with the note sales and the bankruptcy, including Raffensperger and B&T. Plaintiffs contended that Raffensperger and B&T had violated 18 U.S.C. § 1962(c), which makes it unlawful to "conduct or participate * * * in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." They also contended that the petitioners were liable under RICO's conspiracy provision, Section 1962(d).

The district court granted Raffensperger's motion to dismiss the complaint. App. 14a-25a. Relying on *Reves* v. *Ernst & Young*, *supra*, which the parties recognized "as central to the disposition of the § 1962(c) claim" (App. 17a), the court concluded that dismissal was warranted, because plaintiffs had "failed to allege facts from which the Court could conclude that Raffensperger participated in the operation or management of the enterprise." App. 18a. More specifically, the court ruled that Raffensperger "did not become sufficiently intermeshed with Firstmark to be deemed to have participated in operating or managing Firstmark." App. 19a. The court also dismissed the conspiracy claim because plaintiffs failed "to allege any facts from which one could conclude that Raffensperger * * * agreed to participate in the operation or management of Firstmark, the enterprise." App. 23a.

Thereafter, again relying on the "operation or management" test adopted in *Reves*, the district court granted summary judgment to B&T on both the substantive Section 1962(c) claim and the conspiracy claim. App. 40a-59a. The court stated:

> "The evidence * * * does not suggest that [B&T] or Bridge either made decisions for the alleged RICO enterprise or carried decisions out. Rather, the evidence supports only the conclusion that [B&T] was an outside law firm that assisted its client in its affairs. *Reves* tells us that this horizontal connection cannot be the basis for a § 1962(c) RICO claim." App. 57a.

With regard to the Section 1962(d) claim, the court ruled that summary judgment was warranted because plaintiffs had failed to demonstrate that "each defendant * * * agree[d] to participate in the operation or management of the enterprise." *Ibid.*

Plaintiffs moved for reconsideration, based on this Court's intervening decision in *Salinas* v. *United States*, *supra*. Relying on *Salinas*, plaintiffs argued that one can be liable for conspiring to violate Section 1962(c) without agreeing to participate personally in operating or managing the enterprise.

App. 63a. The district court disagreed. It observed that *Salinas* did not address the operation or management test at all and that the Seventh Circuit's prior cases seemed to require that each conspirator agree to "participate" in some way in the affairs of the enterprise. App. 64a. The court reasoned further that "[n]ecessitating an agreement to participate in the operation or management of the enterprise ensures that the nature of the defendant's involvement is such that the provisions of RICO are implicated." App. 65a.

3. ***The opinion below.*** Plaintiffs did not appeal the district court's decision that Raffensperger and B&T were not liable under Section 1962(c), but sought review of the district court's disposition of the conspiracy claims. The court of appeals reversed. Noting that the issue on appeal was "purely legal" in that "the district court's characterization of the facts is not disputed," the court of appeals characterized the case as "a vehicle for trying to reconcile" this Court's decisions in *Reves* and *Salinas*. App. 1a-2a. As framed by the court of appeals, the issue is "whether a party must agree to personally participate in the operation, management, or conduct of the racketeering enterprise for a conspiracy violation to exist under sec. 1962(d) * * * or whether it is enough that the party agrees that some member of the conspiracy conduct or participate in the operation or management of an enterprise * * *." App. 2a.

The court acknowledged that "the limitation on the universe of people that [Section 1962(c)] applies to * * * makes a conspiracy to violate that section conceptually difficult," because "[i]t is a conspiracy to violate a very specific statute which only applies to those who meet the operation or management test of *Reves*." App. 10a. The court nonetheless was persuaded by plaintiffs' argument that *Salinas* precludes application of the "operation or management" test to conspirators. Stating that it would "attempt to make sense out of all of this" and "reconcile *Salinas* and *Reves*" (App. 12a), the court of appeals articulated the following new rule:

> "[O]ne's agreement must be to knowingly facilitate the activities of the operators or managers to whom subsection (c) applies. One must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner. It is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do." *Ibid.*

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF *REVES*' "OPERATION OR MANAGEMENT" TEST TO RICO CONSPIRACY CLAIMS IS AN IMPORTANT AND RECURRING ISSUE ON WHICH THE CIRCUITS ARE IN CONFLICT.

A. Courts And Commentators Acknowledge A Conflict On This Difficult And Important Question.

Since this Court decided *Reves* v. *Ernst & Young*, the courts have struggled with the questions whether, and precisely how, the "operation or management" test for liability under Section 1962(c) of RICO applies to claims of "conspiracy" to violate that subsection. Numerous appellate and district court decisions have grappled with the issue.[1/] Commentators, too, have

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[1/] *E.g.*, *United States* v. *Sharpe*, 193 F.3d 852 (5th Cir. 1999), petition for cert. filed, No. 99-8637 (U.S. March 13, 2000); *Bachman* v. *Bear, Stearns & Co.*, 178 F.3d 930 (7th Cir. 1999); *United States* v. *Posada-Rios*, 158 F.3d 832 (5th Cir. 1998), cert. denied, 526 U.S. 1031 (1999); *Goren* v. *New Vision Int'l, Inc.*, 156 F.3d 721 (7th Cir. 1998); *United States* v. *Thomas*, 114 F.3d 228 (D.C. Cir. 1997); *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123 (9th Cir. 1997); *Webster* v. *Omnitrition Int'l, Inc.*, 79 F.3d 776 (9th Cir. 1996); *MCM Partners, Inc.* v. *Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967 (7th Cir. 1995); *United States* v. *Starrett*, 55 F.3d 1525 (11th Cir. 1995); *United States* v. *Antar*, 53 F.3d 568 (3d Cir. 1995); *Napoli* v. *United States*, 45 F.3d 680 (2d Cir. 1995); *United States* v. *Viola*, 35 F.3d 37

pondered how to apply the principles set forth in *Reves* to conspiracy claims, offering widely divergent opinions.[2/]

Despite this active debate, there is no consensus among the circuits on how the "operation or management" test should apply to conspiracy claims. To the contrary, the six circuits that have decided the issue are clearly divided. See Hon. Jed S. Rakoff & Howard W. Goldstein, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 1.06[4] at 1-94 (1999) (noting that the circuits are in conflict over "whether a defendant can be found liable under Subsection 1962(d) for merely conspiring with

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(2d Cir. 1994); *United States* v. *Quintanilla*, 2 F.3d 1469 (7th Cir. 1993); *Newscope Tech., Ltd.* v. *Ameritech Info. Indus. Servs.*, 1999 WL 199650 (N.D. Ill. April 5, 1999); *BCCI Holdings* v. *Khalil*, 56 F. Supp.2d 14 (D.D.C. 1999); *Madanes* v. *Madanes*, 981 F. Supp. 241 (S.D.N.Y. 1997); *Hayden* v. *Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248 (S.D.N.Y. 1997); *In re American Honda Motor Co. Dealerships Relations Litig.*, 941 F. Supp. 528 (D. Md. 1996); *Biofeedtrac, Inc.* v. *Kolinor Optical Enters. & Consultants, S.R.L.*, 832 F. Supp. 585 (E.D.N.Y. 1993).

[2/] Compare David B. Smith & Terrence G. Reed, CIVIL RICO ¶ 5.04, at 5-44 (Supp. 1999) ("If Congress' restriction of section 1962(c) liability to those who operate or manage the enterprise can be avoided simply by alleging that a defendant * * * conspired with someone who operated or managed the enterprise, then *Reves* would be rendered almost useless.") with G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1460 (1996) (opining that *Reves* "will not affect professionals' and others' RICO liability under * * * conspiracy theories * * * because the Court's opinion is drafted solely from the perspective of determining the liability of a principal in the first degree"). See also Daniel R. Fischel & Alan O. Sykes, *Civil RICO After Reves: An Economic Commentary*, 1993 SUP. CT. REV. 157, 195 ("Lower courts are likely going to struggle with this question suggesting, once again, that the future impact of *Reves* is very unclear.").

someone who is operating or managing an enterprise, or whether a defendant must actually conspire 'to operate or manage an enterprise'"); see also *United States* v. *Thomas*, 114 F.3d 228, 242-43 (D.C. Cir. 1997) (recognizing the split).

B. The Third And The Ninth Circuits Require An Agreement To Participate In Operating Or Managing The Affairs Of The Enterprise.

The Third and the Ninth Circuits have concluded that *Reves* precludes liability for conspiring to violate Section 1962(c) unless the defendant agreed to take some *personal* part in *directing* the RICO enterprise. *United States* v. *Antar*, 53 F.3d 568 (3d Cir. 1995); *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123 (9th Cir. 1997); *Webster* v. *Omnitrition Int'l, Inc.*, 79 F.3d 776 (9th Cir. 1996). These courts arrived at this rule through the straightforward application of *Reves*' "operation or management" test and the language of Section 1962(d): If, under *Reves*, Section 1962(c) only makes it unlawful to "operate or manage" an enterprise through a pattern of racketeering, then Section 1962(d) only makes it unlawful to "conspire" — agree — to do so.

In *Antar*, *supra*, the defendant was charged with violating Section 1962(c) and with conspiring to do so. The Third Circuit held that the defendant was not subject to liability under Section 1962(c), because there was "no evidence to indicate that he played any role in operating or managing the [RICO] enterprise" during the time in question. 53 F.3d at 580. It then proceeded to examine whether he could be liable for conspiracy. The court agreed with the defendant that an overly broad reading of Section 1962(d) would "risk eviscerating *Reves*." 53 F.3d at 581. It therefore concluded that liability for conspiring to violate Section 1962(c) is limited to instances in which the defendant conspired to "operate or manage" the enterprise personally. The court explained:

> "[W]e believe that a distinction can be drawn between, on the one hand, conspiring to operate or manage an

> enterprise, and, on the other, conspiring with someone who is operating or managing the enterprise. Liability under section 1962(d) would be permissible under the first scenario, but, without more, not under the second. That is because in the former situation, the defendant is conspiring to do something for which, if the act was completed successfully, he or she would be liable under section 1962(c). But in the latter scenario, the defendant is not conspiring to do something for which he or she could be held liable under the substantive clause of the statute. Therefore, liability should not attach." *Ibid.*

In *Neibel* v. *TransWorld Assurance Co.*, *supra*, the Ninth Circuit noted that "[s]everal circuits have grappled with the impact of *Reves* on section 1962(d), with varying results," and then adopted the Third Circuit's reasoning in *Antar*. 108 F.3d at 1128. It agreed with the Third Circuit that, to uphold conspiracy liability after *Reves*, there must be "substantial evidence that [the defendant] agreed to have 'some part in direct[ing] [the enterprise's] affairs.'" *Ibid.* (quoting *Reves*, 507 U.S. at 179). See also *Webster* v. *Omnitrition Int'l, Inc.*, 79 F.3d at 789 (lawyer could not be held liable for conspiring to violate Section 1962(c), because his "statements promoting [the client] do not establish that he conspired to participate in the operation or management of the enterprise, as prohibited by 1962(c)").

C. The Second, Fifth, Seventh And Eleventh Circuits Impose Conspiracy Liability On Outsiders Who Have Not Agreed To Direct The Affairs Of The Enterprise.

By contrast, the Second, Fifth and Eleventh Circuits, like the Seventh Circuit in the decision below, have ruled that one need not agree to be personally an operator or manager in order to conspire to commit a violation of Section 1962(c). *United States* v. *Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998);

United States v. *Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995); *Napoli* v. *United States*, 45 F.3d 680, 683-84 (2d Cir. 1995). Each of these circuits has found that a defendant can be held liable for conspiring to violate Section 1962(c) as long as *some member* of the conspiracy agrees to direct the affairs of an enterprise through a pattern of racketeering.

Like the court below, the Fifth Circuit assumed that *Salinas* justifies this retrenchment from *Reves*. In *Posada-Rios*, the Fifth Circuit acknowledged the existence of a conflict among the circuits concerning whether "the direction and control requirements of *Reves* also apply to a RICO conspiracy charge." 158 F.3d at 857. It then decided to reject the Third and Ninth Circuits' rule, "in light of the Supreme Court's decision in [*Salinas*]." *Ibid.*

D. Defining The Proper Scope Of RICO Conspiracy Liability Is Of Great Practical Importance.

As things now stand, therefore, conduct that may engender treble damages and even criminal prosecution under RICO in some circuits would not be considered actionable in others. This fundamental dispute about the very coverage of the statute has been festering for years, and the conflict remains unabated. Review by this Court is necessary to establish uniformity in applying this important and frequently-employed statute.

As this Court has recognized, the civil provisions of RICO, which Congress added virtually as an afterthought, have invited the routine use of RICO as a basis for invoking federal jurisdiction and seeking treble damages from the "deep pockets" in countless business disputes. See, *e.g.*, *Sedima S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 500 (1985) (recognizing that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors"); *id.* at 504 ("[Private] litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions * * *.) (Marshall, J., dissenting). Civil RICO claims are thus a significant part of the docket of the federal courts.

See, *e.g.*, Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 8 (1989) (noting large number of civil RICO cases filling the federal docket); Hon. Jed Rakoff, *supra*, § 2.03 at 2-33 (1999) (referring to "substantial" rate of civil RICO filings, continuing at an average of eighty to ninety per month since 1986). Often, as in *Reves* and the present case, the targets are the professionals and other service providers on the periphery of the transactions, such as the accountants or lawyers. See, *e.g.*, *Grimmett* v. *Brown*, 519 U.S. 233 (1997), dismissing certiorari granted to review 75 F.3d 506, 514-15 (9th Cir. 1996) (civil RICO claim against lawyers).

Experience has shown that plaintiffs will seize the narrowest wedge and try to fracture the structure Congress created in RICO. As the opinion below illustrates, litigators unhappy with the Court's decision in *Reves* have seized upon some of the language in *Salinas* as a tool to try to dismantle *Reves*. See W.B. Markovits, *Expanding RICO Civil Liability for Lawyers and Other "Outsiders": Perspectives of a Plaintiff's Lawyer*, 45 FED. LAW. 35, 36-38 (1998) (referring to conspiracy claims as a "promising alternative" to potential plaintiffs seeking a basis for outsider liability after *Reves*).

Moreover, RICO contains very expansive provisions for jurisdiction, venue and nationwide service of process. See 18 U.S.C. § 1965. Thus, the current inter-circuit discord poses a clear invitation to opportunistic forum shopping. This makes the existence of an outside service provider's liability for treble damages depend on the circuit in which a claimant elects to file a civil RICO case. On so fundamental an issue, this Court should get all the circuits in line.

II. THE SEVENTH CIRCUIT INCORRECTLY RECONCILED THIS COURT'S DECISIONS IN *REVES* AND *SALINAS*.

The clear circuit conflict is reason enough for granting the Petition. Review is also warranted because the Seventh Circuit's effort to "reconcile" *Reves* and *Salinas* creates a

seriously misguided rule of civil and criminal liability, which would excessively extend *Salinas* and essentially nullify *Reves*. In *Reves* this Court concluded that Congress deliberately drew a bright line in this anti-racketeering statute between (a) insiders who participate in operating or managing a corrupt enterprise and (b) outsiders who merely facilitate the activities of those RICO targets. The mere facilitators, who do not themselves take part in operating or managing the corrupt enterprise, may incur liability under other legal doctrines or statutes, but not under RICO. But under the Seventh Circuit's rule, a plaintiff easily can circumvent *Reves*' "operation or management" test by taking exactly the same facts and attaching a "conspiracy" label to the outsider's conduct. There is no reason to believe that the principles that Congress crafted in Section 1962(c) and that this Court articulated in *Reves* erect so flimsy a barrier to outsiders' RICO liability.

A. Congress Intended To Limit The Reach Of Section 1962(c) To Those Who Personally Participate In The Operation Or Management Of The Enterprise.

The facts in *Reves* v. *Ernst & Young* closely parallel those here — except for the result. In *Reves*, after an issuer of demand notes comparable to the notes at issue here went into bankruptcy, some purchasers sued the issuer's auditors under Section 1962(c). Here the plaintiffs sued an outside law firm and an investment banking firm that had rendered professional advisory services to the issuer. In both cases the plaintiffs claimed that the outside service providers had incurred RICO treble-damage liability by knowingly facilitating a fraudulent scheme.

In *Reves*, however, this Court, sticking close to the statutory language, ruled that persons may be held liable under Section 1962(c) only "if they are 'associated with' an enterprise *and participate in the conduct of its affairs* — that is, *participate in the operation or management of the enterprise itself*." 507 U.S. at 185 (emphasis added). The Court found that, under the

language crafted by Congress, Section 1962(c) "cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs." *Ibid.* An outsider leaves this statutory safe haven only by participating or agreeing to participate in the operation or management of the enterprise itself. Accordingly, the Court ruled that an outside accounting firm — which was found to have committed securities laws violations — could not be held liable under RICO merely because it facilitated the scheme by providing audits that knowingly concealed the issuer's dire financial condition.

In its analysis, the Court first examined the text of Section 1962(c), emphasizing that the terms "conduct[ing]" and "participat[ing] in the conduct of" an enterprise's affairs require taking some part in *managing* those affairs. According to the Court, "[i]n order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." 507 U.S. at 179.

The Court also explained that the statute's legislative history "confirms * * * that one is not liable under [Section 1962(c)] unless one has participated *in the operation or management of the enterprise itself*." 507 U.S. at 183 (emphasis added). As the Court noted, members of Congress consistently referred to subsection (c) as prohibiting "the operation of an enterprise" through a pattern of racketeering activity. Various legislators described the prohibited conduct as: "conduct of the affairs of a business *by a person acting in a managerial capacity*, through racketeering activity"; "to *operate* * * * a business by racketeering methods"; and "the use of specified racketeering methods to * * * *operate* commercial organizations." *Id.* at 182 & n.7 (emphasis added) (citations and quotation marks omitted). Other statements made it clear to the Court that "Congress did not intend RICO to extend beyond the acquisition or *operation* of an enterprise." 507 U.S. at 182-183 (emphasis added), citing 116 Cong. Rec. 18940 (1970) (remarks

of RICO's principal author, Sen. McClellan) ("Unless an individual * * * uses that pattern [of racketeering acts] to * * * *operate* an interest in an interstate business, he is not made subject to proceedings under [RICO]") (emphasis added).

The Court was not swayed by the government's argument that excluding outsiders from liability under Section 1962(c) interferes with the general goal of attacking the infiltration of organized crime into legitimate organizations. 507 U.S. at 184-85. The Court observed that other RICO provisions, which are not affected by the "operation or management" test, are directed at the activities of outsiders. 507 U.S. at 185. Significantly, the Court discussed only subsections (a) and (b) as focusing on certain methods of "infiltrating" legitimate businesses and as reaching outsiders under some circumstances. But the Court nowhere suggested that the conspiracy provision in subsection (d) effectively nullifies the restriction built into subsection (c), which confines liability to those persons "employed by or associated with" an enterprise and engaged in conducting or managing its affairs. *Ibid.*

Applying *Reves*, many appellate courts have held that outside professionals and other service providers who do not play a role in *directing* the affairs of an enterprise are not liable under Section 1962(c). See, *e.g.*, *Webster* v. *Omnitrition Int'l, Inc.*, 79 F.3d at 789 (attorney); *Baumer* v. *Pachl*, 8 F.3d 1341 (9th Cir. 1993) (attorney). As the Third Circuit has put it: "Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result." *University of Maryland* v. *Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1538-1540 (3d Cir. 1993) (accounting firm).[3/]

[3/] The district courts have followed suit and consistently dismissed claims against outsiders such as attorneys not directly involved in running the corrupt enterprise, despite evidence that they "may have intentionally assisted a scheme to defraud." *Biofeedtrac, Inc.* v. *Kolinor Optical Enters. & Consultants, S.R.L.*, 832 F. Supp. 585, 589-

As *Reves* itself makes clear, of course, the Court did not issue "an absolute edict that an attorney who associates with an enterprise can never be liable under RICO." *Handeen* v. *LeMaire*, 112 F.3d 1339, 1349 (8th Cir. 1997). Although an outside lawyer does not "expose himself to RICO liability by offering conventional legal advice to a client or performing ordinary legal tasks (that is, by acting like an attorney)," an attorney may be held liable under Section 1962(c) "when he crosses the line between traditional rendition of legal services and active participation in directing the enterprise." *Ibid.* Similarly, a provider of financial services may incur RICO liability when he expands his role to include operating or managing the enterprise itself. See, *e.g.*, *Burke* v. *Dowling*, 944 F. Supp. 1036, 1055 (E.D.N.Y. 1995). Thus, the post-*Reves* cases "reveal an underlying distinction between acting in an advisory professional capacity (even in a knowingly fraudulent way) and acting as a direct participant in [an enterprise's] affairs."[4]

Reves and its progeny thus have developed a relatively clear line for determining when an "outsider" can be liable under Section 1962(c). Nowhere have these courts suggested that a plaintiff can erase this line simply by attaching the "conspiracy" label to outsiders who, under *Reves*, are not liable even for

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91 (E.D.N.Y. 1993) (attorney); see also, *e.g.*, *Sundial Int'l Fund Ltd.* v. *Delta Consultants, Inc.*, 923 F. Supp. 38, 41 (S.D.N.Y. 1996) (banks doing "traditional banking business"); *Bowdoin Constr. Corp.* v. *Rhode Island Hosp. Trust Nat'l Bank*, 869 F. Supp. 1004, 1009 (D. Mass. 1994), *aff'd*, 94 F.3d 721 (1996) (attorneys); *Wiselman* v. *Oppenheimer & Co., Inc.*, 835 F. Supp. 1398, 1403 (M.D. Fla. 1993) (investment banking firms).

[4] *In re American Honda Motor Co. Dealerships Relations Litig.*, 941 F. Supp. at 559-560. See also, *e.g.*, *Napoli* v. *United States*, 32 F.3d 31, 36 (2d Cir. 1994); *Thomas* v. *Ross & Hardies*, 9 F. Supp.2d 547, 555 (D. Md. 1998); *Mruz* v. *Caring, Inc.*, 991 F. Supp. 701, 719-720 (D.N.J. 1998).

knowingly facilitating the illegal management of the enterprise.[5] The rule adopted by the Seventh Circuit would elevate conclusory pleading over this Court's interpretation of statutory text and congressional purpose. Therefore, *Reves* itself demands that the Seventh Circuit's rule be rejected.

B. Congress Did Not Intend That The Conspiracy Provision Would Broaden The Class Of Persons Subject To Liability Under Section 1962(c).

In *Reves*, this Court concluded that Congress defined the core offense under Section 1962(c) as consisting of operating or managing an enterprise through a pattern of racketeering. The statute simply was not designed to reach other persons who play some other kind of role relating to the affairs of the enterprise. There is no reason to believe that the conspiracy provision was meant to supersede this fundamental policy choice. The only reasonable conclusion is that Congress meant to limit liability for conspiring to violate Section 1962(c) to those who *agree* to participate in *operating* or *managing* the enterprise corruptly.

1. The legislative history of RICO contains no suggestion that Congress intended to undo through the conspiracy provision the categorical limitation it imposed on the class of persons who could be liable substantively under Section 1962(c). Indeed, the congressional reports contain only a few mentions of the conspiracy provision, none suggesting any sweeping or overarching objective. See, *e.g.*, H.R. Rep. No. 91-1549, at 4033 (1970) ("Subsection (d) makes conspiracy to violate (a),

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[5] As one court has put it, "to permit advisors, particularly outside professionals, to be held liable * * * under a section 1962(d) theory when, in the wake of *Reves*, a section 1962(c) claim could not be maintained against them would seem to eviscerate the Supreme Court's apparent purpose of permitting outside professionals to extricate themselves from RICO actions by way of a motion to dismiss or for summary judgment." *In re American Honda Motor Co. Dealerships Relations Litig.*, 941 F. Supp. at 561 n.40.

(b), or (c) *equally subject* to the sanctions of sections 1963 and 1964, below.") (emphasis added); S. Rep. No. 91-617, at 34 (1969) (summary of RICO's sections does not mention conspiracy provision at all); *id.* at 76-83 (detailed discussion of objectives underlying RICO but never mentioning conspiracy); 116 Cong. Rec. 585 (1970) (legislative findings summarizing statute, but not even mentioning conspiracy provision).

Similarly, critics and commentators at the time did not suggest that the conspiracy provision was to have any independent sweep. See, *e.g.*, H.R. Rep. No. 91-1549, *supra*, at 4081-84 (dissenting views of Reps. Mikva, Conyers and Ryan do not mention Section 1962(d)); *id.* at 4050-51 (Judicial Conference comments do not mention Section 1962(d)); *id.* at 4052-59 (Justice Department comments do not mention Section 1962(d)). Thus, there is absolutely nothing in the legislative history of the conspiracy provision to undermine this Court's conclusion in *Reves* that Congress "did not intend to extend RICO liability under Section 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity" (507 U.S. at 184).

2. The antitrust laws provide further support for inferring congressional intent to apply *Reves*' "operation or management" test to conspiracy claims. As the Court recently reiterated, "there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration." *Rotella* v. *Wood*, 120 S. Ct. 1075, 1078 (2000); see *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992) (noting RICO was modeled on the Clayton Act, which was in turn modeled on the Sherman Act). In construing RICO, therefore, the Court often has relied upon doctrines developed under the antitrust laws.[6/]

[6/] See, *e.g.*, *Sedima*, 473 U.S. at 489 (following Clayton Act, and holding that RICO does not require a prior criminal conviction before a civil action may lie); *Agency Holding Corp.* v. *Malley-Duff &*

When Congress enacted RICO, it was well understood that antitrust liability attached only to the "individuals through whom a corporation acts and who shape its intentions." See, *e.g.*, *Tillamook Cheese & Dairy Ass'n* v. *Tillamook County Creamery Ass'n*, 358 F.2d 115, 118 (9th Cir. 1966). Thus, an outside professional providing advice and services to a corporation did not incur liability under the antitrust laws unless he adopted the role of an *insider* and exercised the power to shape the company's anticompetitive policy. See *ibid.* (attorney cannot be held liable under Section 2 of the Sherman Act, "if the role of the counsel was only that of a legal adviser," but may incur liability if "he goes beyond that role and, acting by himself or jointly with others, makes policy decisions for the corporation"). This rule is strikingly similar to the "operation or management" test that, according to the Court in *Reves*, Congress incorporated in Section 1962(c) of RICO. See also, *e.g.*, *Invictus Records, Inc.* v. *American Broadcasting Companies, Inc.*, 98 F.R.D. 419, 428 (E.D. Mich. 1982); *Ashley Meadows Farm, Inc.* v. *American Horse Shows Ass'n, Inc.*, 1983 WL 1882, at *3-*4 (S.D.N.Y. Sept. 29, 1983).

Courts have applied the *Tillamook* rule to claims of "conspiracy" to violate the antitrust laws. Thus, outside advisors who are not subject to direct antitrust liability — because they do not direct a corporation's actions — cannot be brought within the reach of the antitrust laws on the theory that they "conspired" with corporate managers. For example, in *Brown* v. *Donco Enters., Inc.*, 783 F.2d 644 (6th Cir. 1986), the plaintiffs claimed that attorneys had "conspired" with their

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Assocs., 483 U.S. 143, 150 (1987) (borrowing 4-year Clayton Act statute of limitations for civil RICO actions); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188-89 (1997) ("Congress consciously patterned civil RICO after the Clayton Act;" rejecting "last predicate act" accrual rule in civil RICO actions as inconsistent with Clayton Act); *Rotella*, 120 S. Ct. at 1079-1080 (relying on Clayton Act analogy in adopting RICO statute-of-limitations accrual rule).

clients to enforce an illegal tying arrangement in violation of the Sherman Act. *Id.* at 645. Affirming the district court's dismissal of the action, the Sixth Circuit stated that "an attorney may be found individually liable under the antitrust laws only if he exceeds his role as legal adviser and *becomes an active participant in formulating policy decisions* with his client to restrain competition." *Id.* at 646 (emphasis added). See also *Pinhas* v. *Summit Health, Ltd.*, 894 F.2d 1024, 1033 (9th Cir. 1990) (en banc) (applying *Tillamook* standard to Section 1 conspiracy claim against a law firm and its principal), aff'd on other grounds, 500 U.S. 322 (1991); *Amarel* v. *Connell*, 102 F.3d 1494, 1522 (9th Cir. 1996) (affirming summary judgment for lawyer on antitrust "conspiracy" claim, because plaintiffs failed to establish that the lawyer had "exerted his influence over his clients so as *to direct the clients to engage* in the complained of acts for an anticompetitive purpose") (quoting *Pinhas*, 894 F 2d at 1033, emphasis added).

3. In other contexts, too, this Court and others have ruled that "[w]here Congress specifically intends to exclude a class of persons from liability for an offense, a person in that class should also be exempt from conspiracy or aiding and abetting liability." Smith & Reed, *supra*, ¶ 5.02 at 5-9. See *Gebardi* v. *United States*, 287 U.S. 112, 123 (1932) (prostitute not liable for "conspiracy" to violate Mann Act); *United States* v. *Nasser*, 476 F.2d 1111, 1118-1120 (7th Cir. 1973) (client not liable for conspiring with former government employee barred from representing private clients in government-related matter); *Nigro* v. *United States*, 117 F.2d 624 (8th Cir. 1941) (addict not liable for conspiracy to violate narcotics prohibition aimed at drug dealers). *Cf. United States* v. *Farrar*, 281 U.S. 624 (1930) (liquor purchaser not guilty of aiding and abetting illegal sale); *United States* v. *Amen*, 831 F.2d 373, 381 (3d Cir. 1987) (no liability for aiding and abetting a crime defined to limit liability to supervisors of a continuing criminal enterprise; "When Congress assigns guilt to only one type of participant in a

transaction, it intends to leave the others unpunished."), cert. denied, 485 U.S. 1021 (1988).

Congress specifically designed Section 1962(c) so that it would reach only those who participate in operating or managing the corrupt enterprise. Congress excluded others who may be peripherally connected to the enterprise and its illegal activities and may facilitate its illegal operations but who do not direct its affairs. It is inconsistent with the statutory design to infer, as the Seventh Circuit's decision assumes, that Congress meant to impose liability on that same class of persons through the barely-mentioned conspiracy provision.

C. Application Of The "Operation Or Management" Test To Conspiracy Claims Comports With *Salinas*.

The Seventh Circuit concluded that this Court's decision in *Salinas* requires ignoring *Reves*' "operation or management" test whenever a plaintiff charges "conspiracy." But the court below misunderstood the fundamental distinction between two elements of Section 1962(c). One is the requirement that *someone* commit predicate acts as part of operating the RICO enterprise; *Salinas* holds that any member of the conspiracy may agree to commit the predicate offenses, but not every member of the conspiracy must agree to do so himself. By contrast, as the court of appeals acknowledged, the "operation or management" test is a "limitation on the universe of people" who can be liable under Section 1962(c) (App. 10a); this test also defines the universe of people *who may be conspirators*. Nothing in *Salinas* justifies using conspiracy law to expand the "universe" of potential conspirators beyond the boundaries prescribed by Congress for Section 1962(c) liability as articulated in *Reves*.

1. The petitioner in *Salinas*, a former deputy sheriff working at a local jail, had been convicted of conspiracy to violate Section 1962(c) for his participation in a scheme to collect bribes in exchange for granting special privileges to a prisoner. He challenged his conviction because "the jury was

not instructed that he must have * * * agreed to commit two predicate acts himself." 522 U.S. at 63.

The Court ruled that an agreement to commit two predicate acts *personally* was not a necessary element of liability for conspiracy to violate Section 1962(c). The Court relied on the principle that "[w]hen Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition." 522 U.S. at 63. The Court then explained that, under "well-established principles" of conspiracy law, a RICO conspirator does not have to agree to commit personally every element of the offense. *Id.* at 65.

2. *Salinas* is fully consistent with the rule, adopted by the Third and Ninth Circuits, that a person must agree to become an operator or manager before he can be subjected to liability for conspiring to violate Section 1962(c). Salinas was charged with conspiring with the sheriff to operate the jail by corruptly selling favors to prisoners. But Salinas himself was an "insider" who had an active role in directing the corrupt enterprise, the local jail. Indeed, the Court emphasized that "Salinas was the chief deputy *responsible for managing the jail* and supervising the custody of the prisoners." 522 U.S. at 55 (emphasis added). Salinas was, therefore, a direct target of culpability under Section 1962(c), because he was a person who did agree to participate in "operating or managing" the corrupt enterprise. Thus, it was entirely appropriate to hold him liable for *conspiring* to participate in *managing* the jail through a pattern of racketeering acts, even if he did not agree to commit the predicate acts of accepting bribes personally.

By contrast, for example, a taxi driver who was *outside* the jail's chain of command and simply conveyed prostitutes to the jail for illicit visits would not, under *Reves*, have been liable under Section 1962(c), even if he knew he was aiding their scheme. Similarly, nothing in *Salinas* indicates that the taxi driver would have been liable as a RICO conspirator, unless he also agreed to participate personally in *operating* the jail

through corrupt acts. As this example illustrates, *Reves*' focus on persons within the chain of command of the RICO enterprise applies directly to conspiracy charges.

The court below commented that "an agreement to participate in the conduct of an enterprise is * * * personal and active. But how one agrees to get the job done * * * is not necessarily personal; it can be delegated." App. 9a. But what the court failed to recognize is that, under *Reves*, "delegation" broadens the scope of RICO conspiracy liability only to the extent that the outside "delegatee" agrees to accept a personal role in *operating* or *managing* the affairs of the corrupt enterprise. This does not mean that an outside service provider (such as B&T or Raffensperger) who does not agree to accept and exercise such managerial authority becomes liable as a "conspirator."

3. The Seventh Circuit concluded that *Salinas*'s use of general conspiracy principles to interpret RICO precluded application of the "operation or management" test to claims of conspiracy to violate Section 1962(c). App. 5a-6a, 12a. But requiring an agreement to operate or manage the enterprise personally is fully consistent with the Court's statement in *Salinas* that Congress intended to use the term "conspiracy" "in its conventional sense." 522 U.S. at 63.

In *Salinas*, the Court noted that Congress must have enacted the RICO conspiracy provision against the backdrop of general principles of criminal law, including those reflected in the recently proposed Model Penal Code ("MPC"). 522 U.S. at 64-65. But those principles expose the flaw in the Seventh Circuit's analysis. In *Reves*, this Court ruled that Congress did not intend to penalize those who merely *aid* the persons who operate or manage the enterprise. Given that legislative judgment, the principles embodied in the MPC show why Congress could not have intended to make liable, under a conspiracy theory, those who merely *agree* to aid them.

As the MPC illustrates, accomplice law and conspiracy law reach the same category of offenders, except that conspiracy covers the agreement to aid in the commission of an offense while accomplice liability attaches if the offense is completed. See Model Penal Code §§ 2.06(3)(a), 5.03(1)(b). But as this Court held in *Reves*, in keeping with the intent of Congress, an outside professional cannot be held liable under Section 1962(c) *unless* that outsider personally participates in managing or operating the corrupt enterprise. This holding establishes that an outsider cannot be held responsible for another person's operation or management of a RICO enterprise under an *accomplice* theory, simply because the outsider facilitated the offense.[7/]

Because Congress elected not to create liability for aiding and abetting a RICO violation, traditional conspiracy principles suggest that Congress cannot have intended to extend *conspiracy* liability to the mere *agreement* to aid or abet a violation. Rather, to read these customary principles of criminal culpability in harmony, the conspiracy provision in Section 1962(d) must be read as reaching only those outsiders who

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[7/] The Court's decision in *Central Bank of Denver N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994), underscores the reason why it would have been improper to imply a private cause of action for "aiding and abetting" a RICO violation of Section 1962(c): "[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." This reasoning applies equally to RICO. See, *e.g.*, *Rolo* v. *City Investing Co. Liquidating Trust*, 155 F.3d 644, 657 (3d Cir. 1998) ("Like § 10(b), the text of § 1962 itself contains no indication that Congress intended to impose private civil aiding and abetting liability under RICO."); *Hayden* v. *Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. at 255-56; *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1475-76 (N.D. Ill. 1996); *Department of Economic Dev.* v. *Arthur Andersen & Co.*, 924 F. Supp. 449, 475-77 (S.D.N.Y. 1996).

agree to participate in managing or conducting the affairs of the corrupt enterprise itself and thus could personally violate Section 1962(c).

4. The rule we support, moreover, comports with the traditional *goals* of conspiracy law. The special punishment of conspiracy rests on the recognition that "[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). These prophylactic objectives are fully served by the Third and Ninth Circuit rule confining conspiracy liability to those persons who agree to participate in operating or managing the corrupt enterprise through a pattern of racketeering.

So construed, the conspiracy provisions capture not only those persons who violate Section 1962(c) by actually participating in operating the corrupt enterprise through racketeering, but also reaches those persons (1) who plan to commit such a violation and fail; (2) who plan to violate Section 1962(c) and are caught before they complete their scheme; and (3) who divide responsibility for completing the scheme among several "operators or managers." Thus, the Seventh Circuit's approach, ignoring the *Reves* test in conspiracy cases, effectively reads the "operation or management" requirement out of Section 1962(c). By contrast, applying the test we advocate allows the conspiracy provision to serve fully the traditional purposes of conspiracy law.

In articulating what purports to be the definitive explanation of RICO conspiracy law, the court below has exacerbated the current circuit conflict. And, ignoring *Reves*, it creates civil and criminal liability where Congress has not imposed it.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROGER L. TAYLOR
THOMAS E. DUTTON
JILL C. ANDERSON
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Petitioner
Raffensperger, Hughes & Co.

PHILIP ALLEN LACOVARA
Counsel of Record
JAMES D. HOLZHAUER
MIRIAM R. NEMETZ
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioners
Barnes & Thornburg and
Catherine L. Bridge

WILLIAM P. WOODEN
MARY TITSWORTH CHANDLER
Wooden & McLaughlin, LLP
1600 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

LAUREN J. ROSENBLUM
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019

Additional Counsel for Petitioners
Barnes & Thornburg and Catherine L. Bridge

APRIL 2000

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1286

VIRGINIA E. BROUWER, WESLEY BAXTER,
ALBERTA E. HAESSIG, HARDY HICKS, JR.,
NATALIE HICKS, GERALD J. MOSS,
VIOLA ROBINETTE, JUNE YOST, and
RUTH WILCHER, individually and on
behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

RAFFENSPERGER, HUGHES & CO.,
CATHERINE L. BRIDGE, and
BARNES & THORNBURG,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis
Division. No. 92 -753-C-D/F—S. Hugh Dillin, *Judge*.

ARGUED SEPTEMBER 30, 1999—DECIDED JANUARY 13, 2000

Before HARLINGTON WOOD, JR., COFFEY, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. Today we find ourselves looking at the intersection between a substantive RICO violation of 18 U.S.C. § 1962(c) (the Racketeering and Corrupt Organizations Act) and a conspiracy violation pursuant to § 1962(d), that is,

trying to reconcile *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163 (1993), with *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469 (1997). Our vehicle for trying to reconcile these cases is this suit brought by a class of unhappy investors against several defendants, including an underwriting firm and a law firm, growing out of work they did for an Indianapolis company called the Firstmark Corporation which is now bankrupt. The underwriting firm, a "Qualified Independent Underwriter" (a QIU in securities argot), is Raffensperger, Hughes & Co., Inc. which got out of the case on its motion to dismiss; Attorney Catherine L. Bridge and her law firm, Barnes & Thornburg of Indianapolis, were granted summary judgment. Motions to reconsider were filed, the last one based on what was then the new decision in *Salinas*. The motions were denied and this appeal was filed.

The issue in this case is, says the plaintiff-class, a purely legal one regarding the requirements for a RICO conspiracy violation under 18 U.S.C. § 1962(d), specifically, whether a party must agree to personally participate in the operation, management, or conduct of the racketeering enterprise for a conspiracy violation to exist under § 1962(d), as defendants claim and the district court found; or whether it is enough that a party agrees that some member of the conspiracy conduct or participate in the operation or management of an enterprise, as plaintiffs argue. It is not exactly a matter of first impression in this circuit, yet the starkness with which the issue is raised requires that we take a close look at several of our cases.

The district court's characterization of the facts[1] is not disputed on this appeal; we will present only a very brief summary. Firstmark is an Indiana holding company whose subsidiaries engaged in various financial services. The

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[1] The district court correctly assumed facts favorable to the plaintiffs to be true when considering the defendants' motions. We, of course, must do the same.

conspiracy here is alleged to have begun around 1981 when two defendants, Leonard Rochwarger and William Smith (who have settled the claims against them, as have several other persons originally named as defendants), devised a plan for Firstmark to become a wholly owned subsidiary of Rockmont Corporation, of which Rochwarger was president and CEO. Firstmark immediately began to have serious financial trouble. In fact, the transaction caused what is described as "crushing debt." As a result, Rochwarger began to sell off Firstmark assets as well as debt securities, including commercial paper. Firstmark's troubles continued in 1986, and its value as a going concern dropped.

At this time it is alleged that Rochwarger and the other defendants devised a scheme to conceal the true financial condition of Firstmark by increasing the margin between the quantity of notes sold to investors and those redeemed by investors. Proceeds from the note sales were used to pay interest and principal on previously sold notes and to finance the sale of more notes. To do this, the conspirators are alleged to have deceived investors into purchasing new notes, rolling over current notes, or otherwise refraining from redeeming their notes. At the same time, insiders were siphoning off the assets of Firstmark. The result was an ever-growing pyramid of debt that forced Firstmark into bankruptcy in 1988. The plaintiff-class fell for the scheme and lost a bundle — $57 million.

The rules of the National Association of Securities Dealers require its members (such as Firstmark) to use the services of QIUs to perform due diligence on registration statements and to recommend a minimum yield for the sale of notes like the ones involved here. That's how Raffensperger became involved with Firstmark; then the Barnes & Thornburg law firm was hired to perform the due diligence that would be the basis for providing the minimum yields at which the notes would be sold. The allegations are that the yields bore no relation to reality. In fact, it is alleged that the yields were set deceptively low to make the notes appear less risky to elderly

investors. It is also alleged that both defendants knew that the investors were likely, if not certain, to lose their entire investment. The law firm allegedly had three main roles: to provide due diligence; to conceal the conspiracy and the substantive violations in registration statements and, when informed of a problem with cash flow by the Indiana Securities Commission, to halt the issuance of certain notes so that Firstmark's problems would not become public; and, once all hope of further note sales was lost, to facilitate the sale of Firstmark to another of the law firm's clients, Capitol Securities, despite knowing of the dire straits that the company was in.

> The RICO conspiracy statute [§ 1962(d)] provides:
>
> > It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

The defendants in this case were accused of conspiring to violate subsection (c), which provides:

> > It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The elements of a subsection (c) offense are (1) conduct (2) of an enterprise (3) through a pattern of racketeering activity. A pattern is the commission of at least two statutorily enumerated "predicate acts." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

What the Court did in *Reves* was to clarify what "participate" and "to conduct" mean under subsection (c); in other words, what the substantive offense is. *Reves* involved whether an outside accounting firm could be liable under

subsection (c) for its activities relating to an inflated valuation of a gasohol plant on the financial statements of a farm cooperative. The Court said no, observing that although liability is not limited to the "upper management" of an enterprise, to "'conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' § 1962(c), one must participate in the operation or management of the enterprise itself." 507 U.S. at 185. The Court concluded that "participate" requires that one have some part in directing the affairs of the enterprise, not primary responsibility, but "some part in directing the enterprise's affairs is required." 507 U.S. at 179. In other words, the statute applies not to "any person," but to any person associated with an enterprise who participates in the operation or management of the enterprise.

As to "outsiders," the Court rejected the argument that its analysis meant that they could never be held accountable under § 1962(c). What the Court said, in part, is:

> Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of its affairs — that is, participate in the operation or management of the enterprise itself . . . .

507 U.S. at 185.

The question remains, however, as to what is required to conspire to violate the substantive provision. This is where *Salinas* comes in. *Salinas*, which was a criminal RICO prosecution, involved the requirement for predicate acts. The defendant in *Salinas* argued that he could not be convicted of a subsection (d) conspiracy offense unless the government proved that he personally agreed to commit two predicate acts. Using general conspiracy principles, the Court rejected the argument, concluding:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the

> elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.

118 S. Ct. at 477. To be convicted of conspiracy a person must agree with other persons that they will engage in conduct that constitutes a crime. The purpose of the agreement is to facilitate the commission of a crime, even though a particular defendant need not perform all of the criminal acts. A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a criminal offense. *Salinas*.

Salinas, applying as it does to predicate acts, did not specifically change the law of this circuit. As far back as *United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986), we said that a conspiracy to violate RICO can be analyzed as two agreements: "an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts." At 499. As the sentence structure indicates, we have not required personal participation in the commission of the predicate acts. But also the sentence structure shows, at least implicitly, that we have required personal participation in the affairs of the enterprise. It is this requirement that the plaintiffs argue must be altered in light of *Salinas*. The argument is that if the general law of conspiracy applies to subsection (d), then it is wrong to require personal participation in the conduct of the affairs of the enterprise. Rather, if it is enough that one agree that someone commit the predicate acts, it should also be enough for a subsection (d) claim that a person agree that someone should conduct the affairs of the enterprise.

Thus the issue before us is whether *Salinas* means that one does not need to personally participate in the operation or management of the enterprise in order to violate subsection (d).

Salinas, focused as it was on the issue of predicate acts, is not directly helpful in supplying an answer to the question. It referred, however fleetingly, to the enterprise requirement but said only that although an enterprise can exist with only one actor to conduct it, in most cases there will be more than one. That fact may "make it somewhat difficult to determine just where the enterprise ends and the conspiracy begins . . . ." 118 S. Ct. at 478.

To summarize that which is clear, subsection (d) of § 1962 requires an agreement to violate another provision of the statute, in this case subsection (c). As we have seen, after *Reves* subsection (c) applies only to those with some degree of management or control over the RICO enterprise. But under general conspiracy law, which *Salinas* says applies to subsection (d), a defendant does not have to agree personally to perform every aspect of a violation and, in particular, one does not need to agree personally to commit the predicate acts. But that leaves a question: what level of participation in the conduct of the enterprise, then, does it take to conspire to violate subsection (c)? It is a question which has received a bit of attention both before and after *Salinas*. *See, e.g.*, *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995); *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123 (9th Cir. 1997); *United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998).

There are various possible answers. Conceivably, it could mean one must agree to actually manage or control, a notion we rejected in *United States v. Quintanilla*, 2 F.3d 1469 (1993). It could mean one has to agree to participate in the conduct of the enterprise. It could mean one has to agree to "maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity," which was our formulation in *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721 (1998). It could mean one has to agree to exercise "some measure" of control over the corporation, as we put it in *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930 (1999). It could mean, as the plaintiffs argue, that

one agrees that someone will participate in the control of the enterprise—that is, that one does not need to agree to personally participate in the control of the enterprise, one needs to agree only that someone should be in charge. Or it could mean something like the formulation of the plaintiffs, offered at oral argument, that a RICO defendant must have knowledge of a violation and agree to facilitate any part of the subsection (c) violation.

In our long-established, two-part analysis of subsection (d) we have consistently required personal participation as to the first element and only an agreement that someone should perform the predicate acts. *Neapolitan*, 791 F.2d at 499. In Goren we concluded that a defendant can be charged under (d) even if he cannot be characterized as an operator or manager of a RICO enterprise under *Reves*. However, we also said that subsection (d) should not be used to criminalize mere association with an enterprise. In order to state a claim under subsection (d)

> Ms. Goren must allege (1) that each defendant agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity and (2) that each defendant further agreed that someone would commit at least two predicate acts to accomplish those goals.

156 F.3d at 732. Goren indicates that the first element requires "each defendant" to participate, while the second requires only that each defendant agree that someone should commit the predicate acts.

In *Bachman* we noted that Bear Stearns, which was allegedly hired to undervalue a business,[2] was a mere hireling.

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[2] When we reviewed *Bachman*, which came to us on a challenge to a Rule 12(b)(6) dismissal, we assumed all alleged facts to be true

As to a subsection (d) claim, we said, in dicta, that Bear Stearns cannot be thought to have been conducting or to have agreed to conduct the affairs of any corporation. "That would require Bear Stearns to have exercised (or agreed to exercise, in order to be liable as a RICO conspirator) at least some measure of control over the corporations." 178 F.3d at 932.

We see no reason to disturb the requirement for some degree of personal participation as to the first element. It is not enough that one agree that someone should run the enterprise and then have no further concern about it. The participation element is different in kind from the requirement for a pattern of racketeering activity. *Reves* makes clear that subsection (c) does not criminalize the actions of everyone who works for a RICO enterprise, nor does it bring within RICO everyone who commits what would be two predicate acts. It only applies to those who participate in the conduct of the enterprise through a pattern of racketeering activity. Agreeing to participate somehow in an enterprise is active; it is personal. In *Salinas* the Court noted a close identity between the enterprise itself and the conspiracy to run it. An agreement to join a conspiracy is highly personal; similarly, an agreement to participate in the conduct of an enterprise is also personal and active. But how one agrees to get the job done — through a pattern of racketeering activity — is not necessarily personal; it can be delegated.

We suspect that the perception of a conflict between *Reves* and *Salinas* does not arise solely or even primarily over a requirement for some degree of personal participation in the affairs of the enterprise. Rather, the conflict is over the level at which personal participation in the enterprise is required. The conflict is a result of the limitation set out in *Reves* as to who can be liable for the substantive offense — not everyone associated with the enterprise, but only those who somehow operate or manage the enterprise. How does that square with

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without, as Chief Judge Posner noted, "vouching for their truth."

conspiracy law? Intuitively, it seems wrong that a person could conspire to violate a law which does not apply to him. The problem can be illustrated by contrasting a RICO conspiracy to violate subsection (c) with a more familiar conspiracy — say one to distribute narcotics. To oversimplify, in a drug distribution conspiracy, a street seller can be a member of the conspiracy if he agrees with the goal of the conspiracy — to distribute drugs. The underlying statute which he is conspiring to violate makes it unlawful for "any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]" (Emphasis added.) 21 U.S.C. § 841. The law makes clear that any person who conspires to commit a drug offense is subject to the same penalties as a person who violates the substantive provision. 21 U.S.C. § 846. In other words, § 841 does not apply only to those persons who "participate, directly or indirectly, in the control" of the distribution network. If it did, would we confidently say that a street seller could be a conspirator?[3] In contrast, the limitation on the universe of people that subsection (c) of § 1962 applies to is what makes a conspiracy to violate that section conceptually difficult. It is a conspiracy to violate a very specific statute which only applies to those who meet the operation or management test of *Reves*.

Yet we previously have said that to be a conspirator under subsection (d) one does not need to be an operator or manager. *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967 (7th Cir. 1995), *cert. denied*, 120 S. Ct. 43 (Oct. 4, 1999). Although in *Bachman* we said that one must agree to exercise "at least some measure of control" over the corporation, we most often say that a defendant may conspire to violate

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[3] The drug laws, of course, contain provisions which apply only to those in control; *e.g.*, enhanced sentencing penalties for organizers or leaders. See 21 U.S.C.§ 848(c). But that limitation is not found in § 841.

subsection (c) "if [he] agreed 'to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity . . . .'" 62 F.3d at 980; see also *Neapolitan*, *Goren*, and *Quintanilla*. We think our formulation continues to describe in a general way the proper standard.

But it needs to be clarified because of a discussion in *Reves* which may cause the phrase to be misunderstood or to have taken on a meaning slightly different from that we intended prior to *Reves*.

We know now that our phrase "conduct or participate in the affairs" of the corporation is broader than the formulation under *Reves* for the underlying substantive offense. The Court in *Reves* explained:

> The more difficult question is what to make of the word "participate." This Court previously has characterized this word as a "ter[m] . . . of breadth." Petitioners argue that Congress used "participate" as a synonym for "aid and abet." That would be a term of breadth indeed, for "aid and abet" "comprehends all assistance rendered by words, acts, encouragement, support, or presence." But within the context of § 1962(c), "participate" appears to have a narrower meaning. We may mark the limits of what the term might mean by looking again at what Congress did not say. On the one hand, "to participate . . . in the conduct of . . . affairs" must be broader than "to conduct affairs" or the "participate" phrase would be superfluous. On the other hand, as we already have noted, "to participate . . . in the conduct of . . . affairs" must be narrower than "to participate in affairs" or Congress' repetition of the word "conduct" would serve no purpose.

507 U.S. at 178-179 (internal citations omitted). The phrase "participate in the conduct of affairs of an enterprise" has taken on the attributes of a term of art. It follows that our long-used phrase "participate in the affairs" may also have a subtly altered meaning after *Reves*, a meaning we could not have anticipated in *Neapolitan*. At the risk of splitting hairs that are already split, we will attempt to make sense out of all of this, reconcile *Salinas* and *Reves*, and explain the kind of personal participation we hold is necessary to violate subsection (d).

To conspire to commit a subsection (c) offense, one would not need, necessarily, to meet the *Reves* requirements: one does not need to agree personally to be an operator or manager. On the other hand, one cannot conspire to violate subsection (c) by agreeing that somehow an enterprise should be operated or managed by someone. That would impose a meaningless requirement and cast a frighteningly wide net. Rather, one's agreement must be to knowingly facilitate the activities of the operators or managers to whom subsection (c) applies. One must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner. It is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do.

All of this said, we are painfully aware that this is not a bright line, that district judges will have to evaluate whether what a defendant agreed to do is sufficient to bring his conduct within subsection (d). The district court in this case did a remarkable job of evaluating these issues. His conclusion, however, was that to be in violation of subsection (d) one must agree to personally participate in the operation or management of the enterprise. That conclusion was wrong. Therefore, we must reverse the court's judgment and remand the case for

reevaluation of the liability of these defendants consistent with this opinion.[4]

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[4] Because this case presents a close question, our opinion has been circulated, pre-publication, to the full court under Circuit Rule 40(e). No judge voted in favor of hearing the case en banc. Circuit Judge Joel M. Flaum did not participate in this case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIRGINIA E. BROUWER,	)	
WESLEY BAXTER,	)	
ALBERTA E. HAESSIG,	)	
HARDY HICKS, JR.,	)	
NATALIE HICKS,	)	
GERALD J. MOSS,	)	
VIOLA ROBINETTE,	)	
JUNE YOST, RUTH WILCHER,	)	
and all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	IP-92-0753-C
	)	
LEONARD ROCHWARGER,	)	
JEFFREY A. ROCHWARGER,	)	
WILLIAM M. SMITH,	)	
HOWARD R. COHEN,	)	
KAVINOKY & COOK,	)	
RAFFENSPERGER,	)	
HUGHES & CO.,	)	
HERBERT L. GROSBY,	)	
DENNIS W. REEDY,	)	
ERNST & YOUNG,	)	
CATHERINE L. BRIDGE,	)	
BARNES & THORNBURG,	)	
INDIANA NATIONAL BANK,	)	
RONALD D. HUNTER,	)	
STEVEN H. ANCEL,	)	
ANCEL & DUNLAP,	)	
PEAT MARWICK, MAIN & CO.,	)	
	)	
Defendants.	)	

ENTRY

This matter comes before the Court on Defendants Raffensperger, Hughes & Company's and INB's Motions to Dismiss Plaintiffs' Third Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted. For reasons detailed below, the Motions are granted.

Background

The Plaintiffs in this lawsuit unhappily bear subordinated investment notes of Firstmark Corporation, a bankrupt holding company. As a result of their losses from investing in these debentures, the Plaintiffs have filed federal RICO, state RICO, and assorted state tort claims against a number of parties involved in the offering of the debentures and the eventual bankruptcy of Firstmark.[5] Defendants Raffensperger, Hughes & Co. and INB presently move for dismissal of the Plaintiffs' suit against them. The Plaintiffs' suit against these Defendants is based on 18 U.S.C. § 1962(c), 18 U.S.C. § 1962(d), and Ind. Code 35-45-6-2(3).

A skeletal analysis of this litigation reveals that Firstmark had retained Raffensperger, an investment banking concern, to act as the Qualified Independent Underwriter for the subordinated investment notes. Raffensperger also helped to sell some of Firstmark's major assets at the request of Firstmark's bankruptcy counsel. INB acted as Indenture Trustee and Authenticating Agent for issuance of Firstmark notes, provided Firstmark with a line of credit, and loaned Capital Securities money to buy Firstmark.

As will become apparent in the remainder of this Entry, Plaintiffs may marshall a parade of liability theories against both Raffensperger and INB. In particular, Plaintiffs' allegations raise troubling issues involving securities and

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[5] For a more detailed description of the circumstances culminating in this lawsuit, consult the Court's October 4, 1993 Entry.

banking laws, common law tort, and ethical and professional guidelines. However, despite all of the wrongdoing alleged, the Plaintiffs have failed to offer any facts which, liberally construed, could state a § 1962(c), §1962(d), or Indiana RICO claim against Raffensperger or INB.

Discussion

Because Raffensperger and INB each seek dismissal pursuant to Fed. R. Civ. P. 12(b)(6), it is axiomatic that the Court look only to the face of the Complaint to determine whether the Plaintiffs have stated a cause of action upon which relief can be granted. Federal courts construe pleadings liberally to do justice, but allegations in the form of legal conclusions fail to state a cause of action. Notice pleading requires the Plaintiffs to allege facts sufficient to inform the Defendants of the events or occurrences on which Plaintiffs base their suit.

With respect to each of the Plaintiffs' three theories of liability, the Court will detail the applicable substantive rules and then assess the Plaintiffs' allegations in light of these rules and the liberal pleading tradition. As will be shown, the Plaintiffs do not allege facts from which the Court could infer that Raffensperger or INB violated any of the three provisions. As a result, the Plaintiffs' suit against Raffensperger and INB is dismissed.

I. 18 U.S.C. § 1962(c)

Section 1962(c) of the RICO Act, 18 U.S.C. § 1961 *et seq.*, provides that "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Thus, to succeed under this provision, a plaintiff must plead and prove "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S.

479, 496, 87 L.Ed.2d 346, 358, (1985). Around each of these elements, a substantial body of case law has developed.

The only § 1962(c) element presently in dispute in this matter is the first, conduct.[6] Fortunately, in *Reves v. Ernst & Young*, — U.S. —, 122 L.Ed.2d 525 (1993), a case both Plaintiffs and Movants recognize as central to disposition of the § 1962(c) claim, the Supreme Court clarified the meaning of the conduct element. The statute's literal proscription on "conduct[ing] or participat[ing], directly or indirectly," said the Supreme Court, should be applied only to forbid "operat[ing] or manag[ing]" an enterprise.

The *Reves* Court reviewed the text of the statute and its legislative history to determine that § 1962(c) primarily was designed to stop racketeers from infiltrating otherwise legitimate entities. *Id.* at —, 122 L.Ed.2d at 540. In light of this purpose and the statutory language, the Supreme Court read this subsection to require a relatively high degree of involvement in the enterprise before § 1962(c) liability would attach. The Court noted that the requisite level of involvement could be expressed and applied easily as an "operation or management"

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[6] The parties agree that the alleged RICO enterprise is Firstmark itself, though the parties also recognize that Firstmark was more than a racketeering enterprise. Unconvincingly, Plaintiffs on occasion try to expand their claims by synonymizing "scheme" and "enterprise." Plaintiffs might have stood a better chance of surviving these Motions to Dismiss had they alleged facts demonstrating that the enterprise was an association in fact between Firstmark principals, Raffensperger principals, and INB principals. Judge Plunkett makes a similar observation in *A.I. Credit Corp. v. Hartford Computer Group, Inc.*, 847 F. Supp. 588, 602 n.5 (N.D. Ill. 1994).

INB also challenges the sufficiency of Plaintiffs' allegations with respect to the "pattern" requirement. Because the Court finds the Third Amended Complaint fails the "operation or management" test of the conduct element, there is no occasion to pass on whether the Plaintiffs adequately allege a pattern of racketeering activity.

test, *id.* at —, 122 L.Ed.2d at 537, and that defendant "must participate in the operation or management of the enterprise itself." *Id.* at —, 122 L.Ed.2d at 540.

Applying this test, the Supreme Court affirmed a summary judgment in favor of an accounting firm that had rendered accounting services to a RICO enterprise. The Supreme Court concluded that even if these services facilitated the racketeering activity, the firm would escape liability unless it participated in the management or operation of the enterprise.

Since the *Reves* decision nearly 20 months ago, a number of courts have had occasion to determine whether the "operation or management" test might allow for a claim against § 1962(c) defendants in a variety of contexts. Unfortunately for the Plaintiffs in this case, a careful reading of *Reves* and its progeny leads the Court to conclude that the Plaintiffs have failed to allege facts from which the Court could conclude that Raffensperger participated in the operation or management of the enterprise.

As noted, with respect to Raffensperger, the Plaintiffs claim that § 1962(c) liability attaches to Raffensperger because of Raffensperger's involvement in the offering of the ultimately worthless debentures and because of its role in the sale of Firstmark's assets. Although Plaintiffs employ the "operate or manage" buzzwords, their allegations do not include facts supporting the legal conclusion they propose. The Plaintiffs at most allege that 1) Raffensperger knowingly set a ridiculous rate at which Firstmark offered the debentures, 2) Firstmark was bound by the rate Raffensperger set, and 3) Raffensperger had a conflict of interest when it was retained to sell and sold Firstmark assets at a bargain.

Even with all of this alleged wrongdoing, the Plaintiffs still fail to make a claim under the "operation or management" test of § 1962(c). Although Plaintiffs allege that Raffensperger "controlled" Firstmark (the enterprise) in setting the minimum rate for the notes, "directly participated" in the note scheme, and

"managed" the sale of the Morris Plan asset, their case loses its luster when stripped of the conclusory legal finish the Plaintiffs use. After recalling the essential allegation that the enterprise is Firstmark itself, it quickly becomes apparent that Raffensperger's involvement in Firstmark — even all of the involvement Plaintiffs allege, liberally construed — is insufficient to suggest that Raffensperger had infiltrated Firstmark or had participated in the operation [or] management of Firstmark.

By setting the minimum rates for the notes, Raffensperger did not necessarily direct Firstmark to do anything. Aside from the rate-setting, Raffensperger had no involvement whatsoever in the offering at issue. Even if Raffensperger violated securities law, common law tort, and ethical or professional guidelines, it did not become sufficiently intermeshed with Firstmark to be deemed to have participated in operating or managing Firstmark. While *Reves* is certain to point out that outsiders and lower-echelon players in an entity can be held under § 1962(c), nothing in *Reves* indicates that simply providing a service — even an essential service in violation of other laws — to an enterprise counts as participating in the operation or management of an enterprise. So it is too with the sale of Firstmark assets: although the Plaintiffs' allegations may support a cornucopia of bases for liability, § 1962(c) is not one of those bases. The limited and discrete task of selling some of the Firstmark assets constitutes inadequate involvement in the enterprise. *Reves* envisions more of an on-going and in-depth participation than Plaintiffs plead. Considering the sum of the allegations does not alter the Court's conclusion.

Much the same can be said with regard to the allegations against INB. Even though Plaintiffs suggest substantial wrongdoing by INB, no facts could lead to the conclusion that INB participated in managing or controlling Firstmark, the enterprise. INB's role in the issuance of the notes was quite similar to Raffensperger's: INB acted as an essential link in the

issuance of the notes, but it cannot be inferred from this role that INB helped control or had infiltrated Firstmark. INB did little beyond facilitating issuance of the notes. For example, there is no allegation that INB told Firstmark when to issue them, how much Firstmark should issue, or what other parties should be involved in the issuance. Even if INB may have been grossly reckless in its role in issuing the notes, this nonetheless is insufficient to generate § 1962(c) RICO liability.

While INB's activities as a lender to Firstmark and to Capital Securities do slightly begin to raise the chances that INB participated in the operation or management of Firstmark, Plaintiffs still fail to offer any facts indicating that INB actually did manage or operate Firstmark. What policy decisions, if any, did INB make for Firstmark, the enterprise? Did INB take part in forcing the enterprise to issue worthless notes? Did INB participate in commanding any party to buy Firstmark or any of its assets? Did INB recover anything other than its typical fees relating to acting as Indenture Trustee, Authenticating Agent, or Creditor?

Other post-*Reves* courts also have concluded that a more significant amount of involvement must be alleged, even in the context of 12(b)(6) motions, for § 1962(c) liability to attach. *See Baumer v. Pachl*, 8 F.3d 1341 (9th Cir. 1993); *University of Md. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534 (3d Cir. 1993).[7] After *Reves*, § 1962(c) has become increasingly barren soil for frustrated investors who, unable to recover from insolvent issuers or offerors, hope to reap their losses (and treble damages) from professionals involved in the issuance of offering. The cases Plaintiffs might corral in support of their position are readily distinguishable. *Resolution Trust Corp. v. Stone*, 998 F.2d 1534 (10th Cir. 1993) involved an enterprise

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[7] This trend is also reflected in other procedural contexts. *See, e.g., Azrielli v. Cohen Law Offices*, 21 F.3d 512 (2d Cir. 1994); *Nolte v. Pearson*, 994 F.2d 1311 (8th Cir. 1993).

consisting of an association in fact of all the defendants. Here, the enterprise was Firstmark, not an association in fact including Raffensperger. *Clark v. Milam*, 847 F. Supp. 409 (S.D.W. Va. 1994) actually explored aiding and abetting liability rather than direct § 1962(c) liability. Both *Portland Gen. Elec. Co. v. Westinghouse Elec. Corp.*, 842 F. Supp. 161 (W.D. Pa. 1993), and *Nebraska Sec. Bank v. Dain Bosworth, Inc.*, 838 F. Supp. 1362 (D. Neb. 1993), involved defendants whose activities in the enterprise were continuous and multifaceted, unlike the relatively isolated services that INB or Raffensperger offered for Firstmark. Plaintiffs suggest that post-*Reves* cases allow counseling or concealing fraudulent conduct to survive the operation or management test, but this is far from clear. *Reves* and the vast majority of post-*Reves* decisions suggest that if the counselors and concealers are not a part of the enterprise,[8] they will be liable under § 1962(c) only if they participate in the operation or management of the enterprise itself.

Accordingly, the Court holds that Plaintiffs have failed to allege facts from which it could be found that Defendants Raffensperger and INB violated 18 U.S.C. § 1962(c).

II. 18 U.S.C. § 1962(d)

Section 1962(d) makes it "unlawful for any person to conspire to violate" any of the other provisions of § 1962. Courts construe this subsection to give effect to its purpose of proscribing the distinct problem of conspiracy. However, § 1962(d) diverges from the common law criminal conspiracy requirements of an agreement and an overt act. Section 1962(d) becomes slightly more complicated because most RICO enterprises themselves involve conspiracies — making § 1962(d) effectively a proscription on conspiracies to conspire

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[8] For example, a counselor or concealer likely could be liable if he was a significant employee of an enterprise that was an otherwise legitimate entity or where the enterprise was an association in fact including the defendant.

— and because the statutory language of the subsection necessarily requires a foray into the legal swamp that the other subsections present.

For § 1962(d) liability to attach for a conspiracy to violate § 1962(c),[9] Plaintiffs must plead facts and demonstrate "that each defendant agreed to conduct the affairs of an enterprise, that each agreed to the [enterprise's] commission of at least two predicate acts, and each defendant knew that those predicate acts were part of a pattern of racketeering activity." *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 352 (7th Cir. 1992). In light of the *Reves* "operation or management" test, which follows *Schiffels* by roughly five months, this Court must conclude that the *Schiffels* test should be modified so that the first of its three prongs is concerned with each defendant agreeing to participate in the operation or management of the enterprise.[10] Plaintiffs must plead facts to support each of the three prongs. In addition to some details of agreement and knowledge, allegations concerning the conspiracy's composition and objectives and each defendant's role are helpful in making the case. *See Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989).

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[9] Plaintiffs do not allege specifically which subsection Raffensperger or INB conspired to violate, but it would appear they seek to base § 1962(d) liability on conspiracy to violate § 1962(c). Subsections (a) and (b) have no connection to their case.

[10] Plaintiffs play fast and loose with the Seventh Circuit's decision in *United States v. Quintanilla*, 2 F.3d 1469 (7th Cir. 1993). Despite Plaintiffs' assertions, *Quintanilla* is no way holds that *Reves* is wholly inapplicable to § 1962(d) actions based on conspiracy to violate § 1962(c). This Court is not holding that subsections (c) and (d) are coterminous. Instead, after *Reves*, (c) needs a showing of participation in operation or management of the enterprise; Subsection (d), when based on conspiracy to violate (c), requires showing of an *agreement* to participate in the operation or management of the enterprise, without regard to whether the defendant could or does so participate.

So, while § 1962(c) proscribes operating or managing an enterprise engaged in a pattern of racketeering activity, § 1962(d), when based on a conspiracy to violate § 1962(c), proscribes agreeing to participate in the operation or management of an enterprise, agreeing that the enterprise commit two predicate acts, and knowing that the acts are part of a racketeering activity. Thus, it is irrelevant whether any racketeering activity ever occurs or whether the defendant actually participates in the operation or management of the enterprise. *United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993).

Without passing on the second or third prong of the § 1962(d) test, the Court holds that Plaintiffs' 1962(d) case against Raffensperger and INB is dismissed for failing to allege facts satisfying the first prong of the *Schiffels* test, post-*Reves*. Aside from conclusory allegations of an agreement, the Plaintiffs do not offer facts suggesting any agreement to engage in prohibited activity. In particular, the Plaintiffs fail to allege any facts from which one could conclude that Raffensperger or INB agreed to participate in the operation or management of Firstmark, the enterprise.

Rate-setting for the Firstmark note offering and selling some assets of the bankruptcy estate do not amount to agreement to participate in operation of management of the enterprise. As with the allegations under § 1962(c), even though Raffensperger might be liable under a variety of provisions, nothing suggests that it agreed to participate in the operation or management of the enterprise. There are no facts alleged that the enterprise sought any involvement from Raffensperger beyond the limited note-related and bankruptcy-related services, nor are there allegations that Raffensperger agreed or offered to provide any greater services constituting participation in the operation or management. The Complaint fails to suggest why Raffensperger would even make such an agreement.

So it is too with the § 1962(d) allegations against INB. Providing services in connection with the issuance of the notes, extending a line of credit to Firstmark, and lending Capital Securities money to purchase Firstmark do not lead to any inference that INB agreed with the other defendants to participate in the operation or management of the Firstmark enterprise. Even if INB conducted all of its activities in connection with Firstmark in an illegal and repugnant manner, this does not mean that it had an agreement with Firstmark to participate in operating or managing Firstmark. What natural persons made the agreement? When did they make it? What were the terms of the agreement? What did INB stand to gain by conspiring? Again, the Court neither expects nor requires detailed, specific facts to answer all of these questions at this stage of the litigation. The Court appreciates that evidence of conspiracy can be especially difficult to discover; nonetheless, the Court does need enough facts to indicate that these questions have answers and that the Plaintiffs could later discover the answers. No such facts have been alleged to carry this case beyond a 12(b)(6) motion.

In sum, beyond bald legal assertions, Plaintiffs offer nothing in the way of facts that suggest any agreement to participate in the operation or management of an enterprise. Accordingly, Plaintiffs' § 1962(d) claim against Raffensperger and INB is dismissed for failure to state a claim upon which relief could be granted.

III. Indiana RICO

Supplementing their federal RICO claims against Raffensperger and INB, Plaintiffs assert a state law claim based on Indiana Code § 35-45-6-1, *et. seq.*, the Indiana RICO Act. The Indiana RICO Act follows the federal act closely, and the parties seem to share the view that the outcome of the federal RICO claims will determine the result in the Indiana RICO claim. The parties relegate their arguments concerning dismissal of the Indiana RICO claim to footnotes and asides.

Indeed there is scant suggestion that the Indiana claim and the federal claims warrant different outcomes. Indiana courts interpreting Indiana RICO provisions have looked to federal precedent for persuasive authority with the result that the Indiana RICO Act has little life of its own.[11] Differing slightly from 18 U.S.C. § 1962(c), the relevant Indiana provision, Ind. Code 35-35-6-2(3), provides that "A person who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in that enterprise through a pattern of racketeering activity" commits a crime. This Court is aware of no Indiana decision engaging in an exegesis of the Indiana provision or giving it a breadth greater than § 1962(c).

With Indiana not yet having construed the provision and with Indiana courts looking to federal precedent to interpret the Indiana RICO Act, this Court believes that Indiana would adopt the *Reves* decision and hold that the relevant Indiana provision also requires a party to participate in the operation or management of the enterprise. Without further intimation by the Indiana courts of their intention to do so, this Court declines to give any independent substantive meaning to the Indiana law.

As a result, the Plaintiffs' Indiana RICO claim is dismissed for failure to allege facts from which to conclude that Raffensperger or INB participated in the operation or management of the enterprise.

Dated this 6th day of October, 1994.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

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[11] Of course the Indiana RICO Act has no requirement that the racketeering occur in or have effect on interstate commerce. There are other minor differences not relevant here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIRGINIA E. BROUWER,	)	
WESLEY BAXTER,	)	
ALBERTA E. HAESSIG,	)	
HARDY HICKS, JR.,	)	
NATALIE HICKS,	)	
GERALD J. MOSS,	)	
VIOLA ROBINETTE,	)	
JUNE YOST, RUTH WILCHER,	)	
and all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	IP-92-0753-C-D/F
	)	July 11, 1995
LEONARD ROCHWARGER,	)	
JEFFREY A. ROCHWARGER,	)	
WILLIAM M. SMITH,	)	
HOWARD R. COHEN,	)	
KAVINOKY & COOK,	)	
RAFFENSPERGER,	)	
HUGHES & CO.,	)	
HERBERT L. GROSBY,	)	
DENNIS W. REEDY,	)	
ERNST & YOUNG,	)	
CATHERINE L. BRIDGE,	)	
BARNES & THORNBURG,	)	
INDIANA NATIONAL BANK,	)	
RONALD D. HUNTER,	)	
STEVEN H. ANCEL,	)	
ANCEL & DUNLAP,	)	
PEAT MARWICK, MAIN & CO.,	)	
	)	
Defendants.	)	

ENTRY

On October 6, 1994, the Court granted Raffensperger's and INB's 12(b)(6) motions to dismiss. This ruling sparked a flurry of motions by Plaintiffs: They have moved the Court to reconsider the portion of the Entry dismissing the 18 U.S.C. § 1962(d) claim against Raffensperger; They've moved for reconsideration of the dismissal of the Indiana RICO claims against Raffensperger and INB; And they've requested leave to file a "Third Amended Complaint As Supplemented," designed to get around some of the problems the Court noted in the October 6, 1994 Entry. As will be detailed below, we deny both motions to reconsider, and we deny leave to add Count VI, the conspiracy to violate 18 U.S.C. § 1962(a) claim. At the same time, we will partially allow leave to add Count VII, alleging an association in fact as the RICO enterprise and violations of 18 U.S.C. § 1962(c). However, we will not permit leave to add Count VII as that Count relates to Raffensperger.[1] Plaintiffs should eliminate the legal claims against Raffensperger in Count VII and file their Fourth Amended Complaint, designated as such, within 10 days of the date of this Entry.

I. THE FIRST MOTION FOR RECONSIDERATION

In the October 1994 Entry, we noted that § 1962(d) makes it illegal "to conspire to violate any of the provisions of subsection (a), (b), or (c)" of § 1962. 18 U.S.C.A. § 1962(d) (1984 & supp. 1995). Since Plaintiffs allege that Raffensperger conspired to violate § 1962(c), they must plead and ultimately

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[1] Thus, in this Entry the Court treats "Plaintiffs' Motion for Reconsideration of Court's Entry of October 6, 1994 Dismissing Plaintiffs' Claims Under 18 U.S.C. § 1962(d)" (document # 609), "Plaintiffs' Motion for Leave to File Third Amended Class Action Complaint as Supplemented" (document # 611), and "Plaintiffs' Motion for Reconsideration of Court's Entry of October 6, 1994 Dismissing Plaintiffs' Claims Under I.C. 35-45-6-2(3)" (document # 640).

prove "that each defendant agreed to conduct the affairs of an enterprise, that each agreed to the commission of at least two predicate acts, and that each defendant knew that those predicate acts were part of a pattern of racketeering activity." *Schiffels v. Kemper Fin. Servs.*, 978 F.2d 344, 352 (7th Cir. 1992) (citations omitted).

Because in *Reves v. Ernst & Young*, — U.S. —, 122 L. Ed. 2d 525 (1993), the Supreme Court held that the "conduct" element in a § 1962(c) case meant that the defendant must "participate in the operation or management of the enterprise," *id.*, — U.S. at —, 122 L. Ed. 2d at 540, we held in October 1994 that assuming the meaning of "conduct" is fixed in the RICO Act., a § 1962(d) claim for conspiracy to violate § 1962(c) requires: (1) each defendant to agree to participate in the operation or management of the enterprise, (2) each defendant to agree to the commission of at least two predicate acts, and (3) each defendant know that the predicate acts are part of pattern of racketeering activity. We made clear that § 1962(c) and § 1962(d) are not coterminous: Subsection (d) prohibits agreement (plus any overt act in furtherance). A defendant who has agreed to participate in the operation or management of the enterprise, who has agreed that any participant will commit two predicate acts, and who knows that these acts are part of a pattern violates § 1962(d) without regard to whether the defendant could or does so participate in operating or managing the enterprise or whether any participant commits any predicate

acts.[2] Conversely, subsection (c) requires, among other things, actual participation in operating or managing the enterprise.

Against this backdrop, Plaintiffs again raise the decision of *United States v. Quintanilla*, 2 F.3d 1469 (7th Cir. 1993), for the proposition that *Reves* is irrelevant to § 1962(d) claims of conspiracy to violate § 1962(c) and that they need only allege that Raffensperger agreed to the commission of predicate acts by enterprise participants. Perhaps because *Quintanilla* opts not to keep conceptually separate the RICO enterprise and the pattern of racketeering activity, it is a little difficult for us to follow the decision. For example, the court states "a RICO conspiracy requires only an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity. Under this approach, it is only necessary that the defendant agree to the commission of the two predicate acts on behalf of the conspiracy." *Id.* at 1484 (citations omitted).

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[2] It is significant that *Schiffels* speaks of each defendant agreeing *to conduct* and agreeing *to the commission* of predicate acts. The infinitive "to conduct" means that each defendant agrees to act. Conversely, the noun (object of preposition) "commission" does not mean that each defendant agrees personally to commit a predicate act. If *Schiffels* had proscribed each Defendant agreeing "to the conducting" of the enterprise, we would not require that each defendant actually participate in the operation or management of the enterprise. Likewise, if *Schiffels* prohibited each defendant from agreeing "to commit" a predicate act, we would require that each defendant agree personally to perform the predicate act. The distinction is between agreeing to act and agreeing to an action.

We are not spending too much time diagramming sentences, and the interpretation we arrive at is supported by *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986) (stating the RICO conspiracy requires two agreements: "An agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts.").

However, on the basis of *Schiffels* and well-established RICO doctrine, we understand the conducting of the enterprise and the commission of the pattern of predicate acts to be distinct issues. Moreover, the agreement to conduct the enterprise cannot be shown simply by or "through" the agreement to the commission of a pattern of predicate acts, just as the enterprise cannot be established by a mere pattern of conspiracy crimes. In other words, the RICO enterprise must always have a life larger than the series of predicate acts. We thought it fundamental that a RICO claim needs a substantially greater showing than does a conventional conspiracy claim. However, under the above-quoted provision of *Quintanilla*, a RICO claim would apparently require nothing more than that necessary to showing a conventional conspiracy to commit two crimes, namely, just an agreement to the commission of two crimes (and any overt act consistent with the agreement).

Quintanilla explains its holding that all that's needed is an agreement that any participant(s) will commit two predicate acts: "We have reasoned thus because to require the government to show that all of the coconspirators conducted, or participated in the conduct, to the extent mandated by § 1962(c)" and *Reves* would be too onerous a burden and mandate a showing of too high a degree of involvement. *Id.* at 1484-85. We appreciate this, but as we noted, § 1962(d) does not require any showing that any participants conducted, or were capable of conducting (or even that there was) an enterprise. All that's at issue in § 1962(d) is *agreement*. *See also United States v. Antar*, 53 F.3d 568 (3d Cir. 1995) (noting that a plain reading of *Quintanilla* would eviscerate *Reves*). The first motion for reconsideration is denied.

II. THE SECOND MOTION FOR RECONSIDERATION

The second motion seeks reconsideration of our conclusion that Indiana courts would read the Indiana RICO Act just as the U.S. Supreme Court had read the federal RICO Act in *Reves*. Plaintiffs spent virtually no time on the Indiana Act

when briefing Raffensperger's and INB's motions to dismiss, and for the first time, in their second motion for reconsideration, point out that the language of the Indiana statute differs slightly from that of the federal statute.

Indiana Code § 35-45-6-2(3) provides that "[a] person [w]ho is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity commits corrupt business influence." Indiana Code § 35-45-6-1 states that "'[r]acketeering activity' means to commit, to attempt to commit, to conspire to commit a violation of, or aiding and abetting in a violation" of a variety of state criminal offenses. In contrast, 18 U.S.C. § 1962(c) makes it illegal "for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Importantly, say Plaintiffs, the federal Act's definition of racketeering activity says nothing about aiding or abetting constituting racketeering activity. *See* 18 U.S.C. § 1961(1).[3]

The parties agree that the Indiana RICO Act is essentially patterned after the federal Act and that so far,

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[3] However, the federal Act generally speaks of Acts "chargeable" or "indictable" under various state and federal laws. Acts aiding and abetting violations of these laws are frequently "chargeable" or "indictable" acts. *See United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F. Supp. 1114 (E.D.N.Y. 1992) (determining that a defendant's aiding and abetting the commission of a predicate act indictable under enumerated provision may constitute a predicate act itself for purposes of RICO). This observation alone reveals the flaws in Plaintiffs' argument that since the Indiana statute allows for aiding and abetting to constitute a predicate act while the federal provision says nothing explicitly about aiding and abetting the state Act requires less involvement for racketeering liability than does the federal Act after *Reves*.

Indiana courts have relied extremely heavily on federal courts' interpretations on the federal Act in their efforts to construe the Indiana Act. Thus, in the October 1994 Entry, the Court concluded that Indiana courts would adopt the *Reves* "operation or management" standard for use in Indiana RICO claims of this sort. However, Plaintiffs now contend that the "aiding and abetting" language in the definition of racketeering activity in the Indiana RICO Act makes it clear that an operation or management standard would not exist under Indiana law.[4] We disagree and continue to believe that Indiana courts would require a significant amount of participation — such as that designated by the operation or management standard — before Indiana RICO liability would attach.

Under both Ind. Code § 35-45-6-2(3) and 18 U.S.C. § 1962(c), a plaintiff must show 1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. The linguistic differences in the respective definitions of "racketeering activity" have no bearing on the "conduct" element of the case, and it was the "conduct" element that formed the basis of the October 1994 Entry dismissing the state and federal RICO claims against Raffensperger and INB. So the Indiana Act may well be read to prohibit participating in the operation or management of an enterprise through a pattern of aiding and abetting violations of the enumerated criminal laws, while the federal Act forbids participating in the operation or management of the enterprise through a pattern of violations of enumerated

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[4] Plaintiffs also stress that since the Indiana law prohibits "knowingly or intentionally conduct[ing] or otherwise participat[ing] in the activities" of the enterprise while the federal law prohibits one from "conduct[ing] or participat[ing], directly or indirectly, in the conduct of [the] enterprise's affairs" the Indiana law does not support an operation or management test. Seeing no material differences in the language used in the respective statutes, the Court disagrees.

criminal laws.[5] Nonetheless, the amount of control and direction a defendant must have in the enterprise under both the state and federal Acts is the same, and it is larger than Plaintiffs claim it is. As a result, we deny reconsideration of the portion of the October 1994 Entry dismissing the Indiana RICO claims against Raffensperger and INB.

III. THE MOTION FOR LEAVE TO FILE THE FOURTH AMENDED COMPLAINT

Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "shall be freely given when justice so requires." Rule 15(a) is to be construed broadly and applied liberally. However, a court may decline to accept an amendment when the amendment causes undue delay or prejudice, if the movant has repeatedly failed to cure deficiencies with past amendments, or if the proposed amendment is futile. In the case of an amended complaint, leave to amend may be denied if the amendment clearly fails to state a claim and the plaintiff has had sufficient opportunity to attempt to state a claim. *Wade v. Hopper*, 993 F.2d 1246 (7th Cir.) (per curiam), *cert. denied*, 126 L. Ed. 2d 151 (1993); *Glick v. Koenig*, 766 F.2d 265 (7th Cir. 1985). Noting that this is hardly Plaintiffs' first attempt to amend their exceptionally

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[5] However, as we noted in footnote 3, under federal law aiding and abetting the commission of a predicate act generally would be a predicate act in itself. Moreover, unlike Plaintiffs, we think it plausible that a person could be deemed to have participated in the operation or management of an enterprise while at the same time have limited his involvement in the commission of predicate acts to a level supporting at most aiding and abetting liability for the predicate acts themselves. While aiding and abetting a violation of the RICO Act apparently does not support RICO liability, it's perfectly conceivable that ongoing aiding and abetting violations of "direct" predicate acts could lead to a conclusion that the aider or abettor participated in the operation or management of the enterprise, thereby violating the RICO Act.

lengthy complaint and that many Defendants have incurred expenses briefing motions to dismiss only to have Plaintiffs repeatedly dodge these bullets by amending their complaint, we also are aware that discovery in this case is far from closed. Plaintiffs seek to amend their complaint by adding Counts VI and VII; We'll deal with each Count in turn.

A. Proposed Count VI

With Count VI, Plaintiffs seek to state a claim against the Rochwargers, Grosby, Reedy, Smith, Cohen, Kavinoky & Cook, Bridge, Barnes & Thornburg, Raffensperger, Ernst & Young, and Hunter for conspiring to violate 18 U.S.C. § 1962(a), in violation of 18 U.S.C. § 1962(d). Section 1962(a) makes it a crime "for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise." The parties agree that the standing principles controlling in a civil § 1962(a) claim also govern standard to bring a suit under § 1962(d) for conspiracy to violate § 1962(a).

Although the Seventh Circuit apparently has not directly addressed the issue, most Circuits require that a person bringing an action under § 1962(a) plead an injury caused by the use or investment of the racketeering proceeds. In an effort to comply with this requirement, Plaintiffs claim that they were injured when the proceeds of the fraudulent note sales were stripped from Firstmark and used to make improper loans and otherwise diverted to the Rochwargers, Rockmont, and Firstmark Standard Life. The result of this pilfering, say Plaintiffs, was that Firstmark had no money to pay on the notes as they matured, causing Firstmark's bankruptcy and leaving the Plaintiffs' investments virtually worthless.

There's a strong case that this sort of injury is not the kind § 1962(a) is designed to address.[6] However, the basis for our conclusion that Count VI should not be allowed is that the claim is clearly derivative, and thus, Plaintiffs may not bring it in their individual capacities. In an effort to explain this conclusion, we draw attention to our October 4, 1993 Entry, which held that Plaintiffs' § 1962(c) claims were *not* derivative of Firstmark because these Plaintiffs, unlike Firstmark itself and the rest of Firstmark's creditors or shareholders, allegedly had been targeted to be defrauded by some of the Defendants. In that sense, these Plaintiffs' injuries, though manifested in a diminution in value of their investment, differed from the

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[6] The most thoughtful RICO treatise suggests that § 1962(a)

> intends to protect (i) legitimate business enterprises that are harmed by being the unwitting recipients of racketeering funds; (ii) persons with some connection to the enterprise who are harmed as a result of the investment of racketeering funds, e.g., those that have diminished roles in the [legitimate] enterprise as a result of the influx of racketeering funds, or those who are victimized by the unlawful enterprise activities enabled by the influx of tainted money; and (iii) competitors of the enterprise that suffer business losses because they are forced to compete with a business financed through racketeering rather than more costly forms of raising capital.
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> . . .
>
> Also significant is the impact on the remainder of RICO's provisions if persons injured only by the predicate acts, and not by the use of investment of the funds the acts generate, are permitted to sue for section 1962(a) violations. If such claims are permitted, the carefully drawn limitations in sections 1962(b) and (c) would effectively be nullified.

2 Arthur F. Mathews et al., *Civil RICO Litigation* § 8.04[D][2][a] (2d ed. 1992).

injuries others suffered. *See also Wooten v. Loshbough*, 951 F.2d 768 (7th Cir. 1991).

Plaintiffs say that that conclusion applies equally to the § 1962(a) claim, but they are mistaken. The § 1962(c) case, as noted, is centered on the alleged frauds Defendants perpetrated on Plaintiffs — the conduct of the enterprise through a pattern of racketeering. Section 1962(a) focuses on the use or investment of racketeering proceeds. The injury Plaintiffs allege — that some of the Defendants stripped Firstmark of the note proceeds, leading to Firstmark's bankruptcy and the destruction of Plaintiffs' investment — must fairly be viewed initially as an injury Firstmark the corporation suffered and secondly as an injury all Firstmark creditors suffered. In other words, the question under § 1962(c) was "who is directly injured by the conduct of the illegal enterprise through the pattern of predicate acts?" while the question under § 1962(d) is "who is directly injured by the pilfering of Firstmark?" The answer to the former can rightly be said to be Plaintiffs since they were singled out for the fraud, and fraud was a part of the racketeering that the corporation and other creditors did not necessarily suffer. However, the answer to the latter question clearly is that Firstmark was the first to suffer when the Defendants allegedly stripped it of its assets. While a significant portion of these assets were proceeds from the fraudulent note sales, that does not give Plaintiffs an additional injury, either beyond or more direct than that Firstmark suffered.

Whether Plaintiffs' predicament is described as a problem of standing (*Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333 (7th Cir. 1989)) or as one of proximate cause (*Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)), it is quite clear that only those directly injured by reason of the RICO violation may sue. *See also In re Sunshine Sec. Litig.*, 916 F.2d 874 (3d Cir. 1990); *Levine v. Prudential Bache Properties, Inc.*, 855 F. Supp. 924 (N.D. Ill. 1994). Perhaps Firstmark should have sued the Rochwargers, among

others,[7] but these Plaintiffs have insufficient allegations that they were directly injured by the use or investment of racketeering proceeds, and as a result, their attempt to add Count VI is denied as futile.

B. Proposed Count VII

In proposed Count VII, Plaintiffs take another stab at stating a claim under § 1962(c). Seizing a cue in footnote 2 of the October 1994 Entry, Plaintiffs allege that the RICO enterprise was not Firstmark, but was instead an association in fact comprised of the Rochwargers, Smith, Grosby, Reedy, Barnes & Thornburg, Bridge, Cohen, Kavinoky & Cook and Raffensperger. An association in fact can be a RICO enterprise according to 18 U.S.C. § 1961(4). The allegations rather meticulously describe the enterprise's structure and purpose, and it would appear that leave to add this Count should be allowed. However, while we'll allow leave to add most of this Count, we're not going to allow it as against Raffensperger.

One purpose of the proposed amendment is to circumvent the conclusion that Raffensperger did not participate in the operation or management of the RICO enterprise, which Plaintiffs consistently had identified as Firstmark. In the October 1994 Entry, the Court held that the allegations that Raffensperger had provided investment banking services to Firstmark, set a ridiculous rate at which Firstmark was bound to offer the eventually worthless notes, and participated in the sale of Firstmark assets during the bankruptcy could not, liberally construed and taken as true, support a conclusion that Raffensperger had participated in the operation or management of the enterprise. *See also United States v. Viola*, 35 F.3d 37, 41 (2nd Cir. 1994) (noting that "taking directions and performance

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[7] Indeed, the Court seems to recall an adversary proceeding in the Firstmark bankruptcy that resulted in Rockmont paying Firstmark $3 million and for a $9 million dollar judgment being entered against Rockmont and released. But that's neither here nor there at present.

of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)").

By casting Raffensperger as a member of the enterprise as opposed to as a firm providing essential services to the enterprise, Plaintiffs hope for an ipso facto conclusion that Raffensperger had sufficient involvement in the enterprise to support § 1962(c) liability. However, the proposed amendment offers nothing new against Raffensperger, and the contention that it was a member of the enterprise makes no difference to the Court's conclusions concerning Raffensperger's involvement. It's still the case that all the Plaintiffs allege against Raffensperger is that it set the rates for the note offering and did a recklessly or knowingly bad job and that it performed poorly when it assisted in the sale of estate assets. There is nothing to show that Raffensperger was involved in directing or planning the enterprises activities. So, even if Raffensperger is deemed a "member" of an association in fact RICO enterprise, it did not participate in the operation or management of the enterprise, and the proposed Count VII, as it relates to Raffensperger, is futile.

Since the Court has drawn no conclusions so far about the sufficiency of the allegations as they relate to the other members of this purported association in fact, the Court will permit Plaintiffs to take the proposed Third Amended Complaint As Supplemented, delete Count VI, delete the legal claims against Raffensperger in Count VII and renumber Count VII as Count VI, and file a Fourth Amended Complaint, designated as such, no later than 10 days from today. Although some of the parties (specifically, Cohen, Barnes & Thornburg, and Bridge) named in the proposed Count VII have recently moved for summary judgment, we're confident that these parties can supplement their motions and address the new Count. Should they wish to do so, their supplementary motions are to be filed 21 days from today, with responses and replies filed according to the local rules.

The motions to reconsider the October 6, 1994 Entry are denied. The motion for leave to amend is denied with respect to proposed Count VI. The same motion is granted with respect to proposed Count VII, except as it relates to Raffensperger. The Fourth Amended Complaint and the supplementary motions for summary judgment and briefing thereon should be filed according to the schedule detailed above.

So ordered this 11th day of July, 1995.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIRGINIA E. BROUWER, WESLEY BAXTER, ALBERTA E. HAESSIG, HARDY HICKS, JR., NATALIE HICKS, GERALD J. MOSS, VIOLA ROBINETTE, JUNE YOST, RUTH WILCHER, and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	IP-92-0753-C-D/F
LEONARD ROCHWARGER, JEFFREY A. ROCHWARGER, WILLIAM M. SMITH, ERNST & YOUNG, CATHERINE L. BRIDGE, BARNES & THORNBURG, RONALD D. HUNTER, LEONARD OPPERMAN, and BOSE, McKINNEY & EVANS,	)	
Defendants.	)	

ENTRY

This cause is before the Court on a motion for summary judgment filed by defendant Barnes & Thornburg

and defendant Catherine L. Bridge. For the following reasons, the motion is GRANTED.[1]

Background

Firstmark Corporation (Firstmark) was a holding company with offices in Indianapolis, Indiana that held several subsidiaries, including Indianapolis Morris Plan, Firstmark Financial Corporation, Firstmark Standard Life Insurance Company and Tower Life Insurance Company, most of which were insurance companies. Firstmark itself was owned by Rockmont Corporation, which was owned and controlled by defendant Leonard Rochwarger. Firstmark filed a Chapter 11 bankruptcy on August 26, 1988 in the United States Bankruptcy Court, Southern District of Indiana, Indianapolis Division.

Plaintiffs in this case are the holders of subordinated investment notes of Firstmark Corporation. Defendants are the promoters of the note issues and the professional and

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[1] Following a fairness hearing conducted on March 10, 1997, during which settlements between plaintiffs and defendants Howard R. Cohen, Kavinoky & Cook, Herbert L. Grosby, Dennis W. Reedy, Steven H. Ancel, Ancel & Dunlap, and Peat, Marwick, Main & Co., were approved, the Court entered final judgments dismissing these settling defendants from this case. *See* Final Judgment and Order of Dismissal With Prejudice, Cause Number IP-92-0753-C-D/F (S.D. Ind. March 10, 1997) (relating to defendants Steven H. Ancel, Ancel & Dunlap, Peat, Marwick, Main & Co., Dennis W. Reedy, and Herbert L. Grosby); Final Judgment and Order of Dismissal With Prejudice, Cause Number IP-92-0753-C-D/F (S.D. Ind. March 10, 1997) (relating to defendants Kavinoky & Cook and Howard R. Cohen). Hence, we have removed these defendants from the caption. The Court notes, however, that during the fairness hearing the Court granted certain other defendants' motions to name these settling defendants as nonparty defendants to this action.

individuals (and their respective controlling persons) who were instrumental in the sale of the notes to public markets.[2]

In the present motion, defendant Barnes & Thornburg, an Indianapolis law firm, and defendant Catherine L. Bridge (Bridge), a Barnes & Thornburg attorney, seek summary judgment on the state and federal RICO claims plaintiffs have lodged against them. We turn to address the issues.

Discussion

Summary judgment is appropriate when there are no genuine issues of material fact, leaving the moving party entitled to judgment as a matter for law. Fed. R. Civ. P. 56(c). While facts are viewed in the light most favorable to the nonmoving party, there is an affirmative burden of production on the nonmoving party to defeat a proper summary judgment motion. *Baucher v. Eastern Ind. Proc. Credit Ass'n*, 906 F.2d 332, 334 (7th Cir. 1990) (following *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). Before the Court denies summary judgment, it must be determined whether there is sufficient evidence for a jury to find a verdict in favor of the nonmoving party. *Id.* (following *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

In Count VI of plaintiffs' revised fourth amended complaint, plaintiffs allege that Barnes & Thornburg and Bridge, along with defendants Leonard Rochwarger, Jeffrey Rochwarger, William Smith and nonparty defendants Herbert Grosby, Dennis Reedy, Howard Cohen and Kavinoky & Cook, violated 18 U.S.C. § 1962(c). Plaintiffs claim that these defendants "constituted an association-in-fact" and that the

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[2] Plaintiffs characterize defendants' efforts regarding the sale of subordinated notes as a "Ponzi scheme." A "Ponzi scheme" is a type of fraud which requires an ever increasing stream of investors in order to fund obligations to the earlier investors, with a resulting pyramiding of the liabilities of the enterprise. *United States v. Shelton*, 669 F.2d 446 (7th Cir. 1982).

association-in-fact "intended to and did systematically dismantle Firstmark in order to completely destroy its ability to repay the Firstmark Notes." Revised Fourth Am. Class Action Compl. at 81.

Section 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Hence, to succeed in a § 1962(c) claim, a plaintiff must plead and prove "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Presently, the defendants contend that plaintiffs have failed to offer evidence to establish either prong one or prong two of this test. Hence, defendants assert, no § 1962(c) claim lies. We begin our analysis with the first prong of the test — conduct.

This Court earlier discussed *Reves v. Ernst & Young*, 122 L. Ed. 2d 525 (1993) and the light that case shed on the meaning of the conduct element. According to the Supreme Court, "[t]he statute's literal proscription on 'conduct[ing] or participat[ing], directly or indirectly' should be applied only to forbid 'operat[ing] or manag[ing]' an enterprise." Entry, Cause Number IP-92-0753-C (S.D. Ind. Oct. 6, 1994). In *Reves*, the Supreme Court read § 1962(c) to require a relatively high degree of involvement in the enterprise before § 1962(c) liability would attach. The Court noted that the requisite level of involvement could be expressed and applied easily as an "operation or management" test, *Reves*, 122 L. Ed. 2d at 537, and that the defendant "must participate in the operation or management of the enterprise itself." *Id.* at 540.

Since the *Reves* opinion issued, the Seventh Circuit has had the opportunity to discuss its implications. In *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967 (7th Cir.

1995), the court endorsed the First Circuit's interpretation of *Reves*.

> *Reves* is a case about the liability of *outsiders* who may assist the enterprise's affairs. Special care is required in translating *Reves* concern with "horizontal" connections — focusing on the liability of an outside adviser — into the "vertical" question of how far RICO liability may extend within the enterprise but down the organizational ladder. In our view, the reason the accountants were not liable in *Reves* is that, while they were undeniably involved in the enterprise's decisions, they neither made those decisions nor carried them out; in other words, the accountants were outside the chain of command through which the enterprise's affairs were conducted.

Id. at 978 (quoting *United States* v. *Oreto*, 37 F.3d 739, 750 (1st Cir. 1994) (emphasis in Oreto) (further citations omitted)). The Seventh Circuit found that *Oreto*

> correctly reconciles the Supreme Court's holding in *Reves* — that a defendant must play some part in directing the enterprise's affairs — with its subsequent statement that "lower-rung participants . . . under the direction of upper management" may also "operate" the enterprise.

Id. at 978 (citations omitted).

In the present case, plaintiffs, by, casting Barnes & Thornburg and Bridge as members of an association in fact,[3]

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[3] In a July 11, 1995 Entry, this Court permitted plaintiffs to amend their complaint to add Count VI, wherein plaintiffs alleged that the

seek to force these two defendants into a role "inside" the RICO enterprise itself — a role that is within the "chain of command through which the enterprise's affairs were conducted." *Id.* at 978 (quoting *Oreto*, 37 F.3d at 750). In fact, plaintiffs believe that the roles of Barnes & Thornburg and Bridge properly are viewed as ones in "upper management." Pl.s' Opp'n at 45. At the very least, plaintiffs contend, these defendants are "lower-rung participants" in the alleged association in fact and, hence, summary judgment in their favor would be inappropriate. An examination of the record, however, leads the Court to reject plaintiffs' attempt to categorize Barnes & Thornburg and Bridge as insiders. We explain.

Plaintiffs sum up their view of these defendants' conduct for purposes of RICO in their opposition brief.

> B&T filled many roles on behalf of the association-in-fact. As counsel to the QIU [Qualified Independent Underwriter], it regularly examined the financial condition, *i.e.* due diligence, and prepared the securities documents necessary to permit the sale of Firstmark Notes that was crucial to the association's purpose. . . . However, once further Note sales became impossible, and Firstmark was insolvent, B&T moved into still further, more pervasive participation, and facilitated the sale of that company to Capitol Securities, and Ron Hunter, a man whose goal was to acquire Firstmark Standard Life Insurance Company, Firstmark's most valuable asset. . . Having enabled the transfer of

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underlying RICO enterprise was an association in fact that included, among others, Barnes & Thornburg and Bridge. Previously, plaintiffs had contended that the RICO enterprise was Firstmark.

> Firstmark into the hands of the man that would complete Firstmark's dismantling, the facts now show that B&T then led Hunter to Steven Ancel, the attorney that would guide the Firstmark bankruptcy so that Hunter could acquire Firstmark Standard Life while avoiding payment on the subordinated debt.

Pl.s' Opp'n Br. at 46.

Despite this summary of the defendant's activities, the compilation of evidence plaintiffs submit to advance their position fails to illustrate that Barnes & Thornburg and Bridge served as anything more than outside counsel. The evidence does not suggest that these defendants were foot soldiers in a RICO association in fact, much less members of upper management.

Plaintiffs point out that Barnes & Thornburg served as legal counsel to more than one of the entities involved in the alleged association in fact. While plaintiffs are correct in this observation, they have offered no evidence indicating that such representation places Barnes & Thornburg or Bridge within the chain of command of the alleged association in fact, even when that evidence is viewed in conjunction with plaintiffs' other allegations. In another attempt to strengthen their argument that the defendants' involvement was from the inside, plaintiffs argue that Bridge "sat on the three-member Executive Committee of Capitol Securities along with Ronald Hunter, its President." Pl.s' Opp'n Br. at 10. Defendants explain, however, that plaintiffs misinterpreted the document on which they rely for this contention. We agree. Correctly read, it is clear that Bridge did not sit on the executive committee, but rather Charles Beard did. Plaintiffs misinterpreted the initials "Ch.B."

Additionally, plaintiffs focus on a memorandum Bridge sent to three other attorneys at Barnes & Thornburg regarding Barnes & Thornburg's potential representation of Firstmark

after its contemplated purchase by Capitol Securities. In that document, Bridge states:

> I would like to continue the representation of Capitol/Firstmark since I believe we will be able to obtain significant legal work from these companies in the areas of loan documentation, workout, litigation, corporate and securities matters. However, I also acknowledge that the deteriorating financial condition of Firstmark makes this a "risky" employment.

Pl.s' Ex. BT 057525. A review of this memorandum indicates to the Court that Barnes & Thornburg and Bridge acted only as outside counsel. The remarks in this memorandum certainly could not be construed to suggest that these defendants were within the association in fact itself.

Next, plaintiffs assert that Barnes & Thornburg and Bridge knew that Firstmark was in financial despair, but nevertheless continued to perform due diligence for the preparation of prospectuses used to sell notes. Plaintiffs argue that while noteholders were being told that plans existed to restore Firstmark's profitability, Barnes & Thornburg and Bridge, as well as other defendants, allegedly knew that no such plan would be pursued.

Plaintiffs' argument appears to stem from a November 5, 1986 prospectus concerning Firstmark's Series F notes. In that prospectus, readers were informed that the proceeds of the Series F Notes would be used in part to pay interest on or principal of previously issued investment notes; that Firstmark's financial figures "reflect a very high leverage which makes the Company very vulnerable to material adverse effects on its financial condition as a result of losses;" and that [i]f the Company's *plans to restore profitability* to its day-to-day operations are not successful and there are neither infusions of new capital nor gains from the sale of assets or other nonrecurring transactions, the Company's stockholder's

equity will continue to erode." Def.'s Supp'l App., Ex. 1 (emphasis added).

The preceding remark, concerning plans for the restoration of Firstmark's profitability, apparently is the source for plaintiffs' assertion that Barnes & Thornburg and Bridge led investors astray about Firstmark's "plans to restore profitability." Following an examination of the relevant portions of the prospectus, as well as other parts of the record, however, the Court must conclude that plaintiffs[] have created no issue of material fact. Indeed, the prospectus mentions "plans to restore profitability." Nonetheless, the mere mention of the plan — particularly in the context in which it appears — does not end the matter. First, the Court notes that inclusion of the subject sentence in the prospectus would seem more likely to trigger skepticism rather than confidence in the investment. Second, assuming that the mention of a plan generated optimism, the issue obviously becomes either whether such a plan existed or whether Barnes & Thornburg and Bridge at least thought such a plan existed. The record indicates that Barnes & Thornburg, in conjunction with their due diligence work, discussed such plans with Firstmark executives. And, as Barnes & Thornburg and Bridge assert, plaintiffs have offered no evidence supporting their allegation that the instant defendants fraudulently included reference to a plan in the prospectus. Knowledge of a company's ailing financial situation, standing alone, does not render one liable under RICO. Plaintiffs have failed to offer any evidence that Barnes & Thornburg or Bridge acted fraudulently in the context of its work on the prospectuses or registration statements associated with the notes in issue.

We turn now to plaintiffs' contention concerning the defendants' work with Raffensperger, Hughes & Co., (Raffensperger), the qualified independent underwriter (QIU) selected to prepare yield recommendations for Firstmark notes. The record indicates that Barnes & Thornburg was counsel for Raffensperger, and that Barnes & Thornburg drafted the QIU

agreement between Raffensperger and Firstmark. In plaintiffs' opposition brief, they first complain that in the performance of its duties, Raffensperger deviated from the QIU agreement. Then, plaintiffs leap to the conclusion that Barnes & Thornburg should be held accountable for Raffensperger's alleged misdoings. Plaintiffs argue:

> Having drafted the Qualified Independent Underwriter Agreement . . . which required that the yield recommendation of its client, Raffensperger, be based both on a market analysis as well as on the financial condition of Firstmark, Barnes & Thornburg was responsible for continuing to approve its client's flagrant violation of the terms of the very contract that it had drafted.

Pl.s' Opp'n Br. at 17-18. Plaintiffs make no attempt to explain why Barnes & Thornburg should be held accountable for its client's alleged breach of contract. And the Court, without more, refuses to entertain such notion.

Furthermore, plaintiffs allege that Barnes & Thornburg "apparently agreed that no termination of the yield recommendation was necessary, thereby perpetuating the Note scheme." Pl.s' Opp'n Br. at 18. They also claim that, "As time went on Barnes & Thornburg also agreed that Firstmark, rather than Raffensperger, would dictate what the minimum rate would be." *Id.* at 19. Pertaining to the former allegation, plaintiffs offer no evidence. Concerning the latter allegation, they point only to a letter written by a Firstmark representative to a Raffensperger representative in which Firstmark informed Raffensperger that it intended to reduce the interest rate on certain notes and requested Raffensperger's yield recommendation letter by date certain. Pl.s' Ex. MCP 7197. Reviewing this letter, the Court is unpersuaded that an inference that Barnes & Thornburg or Bridge managed or controlled a RICO enterprise can be drawn from the fact that

a Barnes & Thornburg representative received a copy [of] the letter. First, Raffensperger was Barnes & Thornburg's client, so there appears nothing unusual about Barnes & Thornburg receiving a copy of the correspondence. Moreover, merely having received a copy of this letter does not suggest that Barnes & Thornburg operated or managed a RICO enterprise.

Several pages of plaintiffs' opposition briefs focus on information about which they contend Barnes & Thornburg had knowledge. Plaintiffs assert that the defendants had knowledge of, for example, the fact that Firstmark was soliciting Morris Plan customers to invest in the notes — customers for whom the investments reportedly were unsuitable. Plaintiffs also continue to assert that Barnes & Thornburg and Bridge were *concerned* about Firstmark's financial condition. What plaintiffs fail to illustrate to the Court, however, is how or why that knowledge or concern should be transformed into direction of the alleged association's activities or how such knowledge or concern placed Barnes & Thornburg or Bridge in the chain of command. Without such transformation, plaintiffs' cannot meet their burden of proof in the context of RICO.

Plaintiffs furthermore contend that Barnes & Thornburg and Bridge are liable under RICO because they were responsible for Capitol Securities' purchase of Firstmark. Capitol Securities was owned by Ronald Hunter (Hunter) and, according to plaintiffs, the defendants brought Hunter and Firstmark together. During Hunter's purchase of Firstmark, plaintiffs state, Rockmont (Firstmark's seller) was permitted to "siphon off" the company's last few assets. Moreover, plaintiffs declare, by arranging Hunter's purchase of Firstmark, the defendants prevented the triggering of events that would destroy the note scheme.

The evidence to which plaintiffs point, however, does not support their contentions. The evidence illustrates not that Barnes & Thornburg and Bridge directed the affairs of the

alleged association in fact, but rather that these defendants' role was limited to that of outside counsel to Capitol Securities. For example, Bridges notes that "$80,000/ mo. is going to Rochwarger's expenses. The family is raping the co." Such statement certainly does not suggest to the Court that Bridge was on the "inside" or was directing the association. Rather, it indicates that Bridge was making observations stemming from her representation of Capitol in its contemplated purchase of Firstmark. So, too, it is with another of the memorandums plaintiffs use to support their theory. Plaintiffs found in Barnes & Thornburg's possession a memorandum to the file regarding Capitol's proposed acquisition of Firstmark. The memo included items which representatives for Barnes & Thornburg, and Russ Pieri, attorney for Kavinoky & Cook (Firstmark's counsel), discussed prior to the sale of Firstmark to Capitol. One of Bridge's notations from that conversation reads:

> Since FMC is insolvent, it cannot declare dividends. Hence it loaned the amount to Rockmont necessary to permit Rockmont to pay dividends on preferred stock. Will the forgiveness of this indebtedness as well as the book value sales of various assets to Rockmont be characterized as illegal dividends? What would be the repercussions of such an arrangement?

Pl.s' Ex. B&T at BT 035086.

While this note indicates that Bridge was aware of potential problems within Firstmark, it does nothing to support plaintiffs' argument that Barnes & Thornburg and Bridge directed the activities of the alleged association in fact. Moreover, the documents plaintiffs submit to prove that Bridge directed the affairs of the association through her involvement with the sale of Firstmark assets — in particular, an airplane leased by Firstmark Leasing Corporation — do not

suggest that Bridge was working in any capacity other than outside counsel. The documents proffered suggest nothing more than an attorney representing a client. The documents [do] not intimate that Bridge was involved in the alleged association in fact.

Next, plaintiffs contend that Barnes & Thornburg and Bridge also directed the association in fact through their participation in Firstmark's attempt to sell the Series A subordinated notes. Plaintiffs recite the background of the Series A subordinated notes, which, incidentally, never were issued. As plaintiffs assert, the record illustrates that Barnes & Thornburg did some legwork in preparation for issuance of Firstmark's Series A subordinated notes. Barnes & Thornburg representatives asked Firstmark for the relevant advertising material and on August 31, 1987, representatives sent Firstmark's final prospectus for Series A notes to the Indiana Securities Commission and the Florida and Pennsylvania Securities Commissions for registration purposes.

These activities, however, are illustrative of nothing more than a lawyer lawyering. Barnes & Thornburg's preparatory work for Firstmark's issuance of a new series of subordinated notes, without more, does not imply to the Court that Barnes & Thornburg was directing the affairs of a RICO enterprise. Moreover, the plaintiffs' attempt to transform a Barnes & Thornburg representative's telephone call to the Indiana Securities Commission into control of the association in fact is unavailing. Specifically, on September 25, 1987, Barnes & Thornburg received a mailgram from the Indiana Securities Commission informing the reader that Firstmark's "cash flow appears to be insufficient to cover interest on notes." In response, a Barnes & Thornburg representative, Frank Sullivan (Sullivan), called the Indiana Securities Commission to inform the commission that the notes (Series A) had not yet been distributed and that Firstmark would be back in touch with the commission prior to the commencement of distribution. Sullivan stated in his letter to

Firstmark describing his action, "I made that call so that the Securities Commissioner would not feel any need to take any public or private action against the Corporation."

The plaintiffs used this evidence in two ways. First, they argue that Sullivan "took control" of Firstmark when he told the commissioner that distribution of the notes would not commence until after the commissioner was contacted. The defendants dispel this notion by offering evidence illustrating that Firstmark, itself, had decided at least by September 3, 1987 not to issue Series A notes until Firstmark's net worth was replenished. Hence, through his telephone conversation with the commission, Sullivan was not directing or controlling the affairs of the alleged association. Rather, he was relaying information as outside counsel.

Second, plaintiffs contend that Sullivan's action grew from "Barnes & Thornburg's appointed task of keeping true information about Firstmark from reach of the public." Pl.s Opp'n Br. at 32. Importantly, the plaintiffs have offered no direct evidence supporting their theory that Barnes & Thornburg had any "appointed tasks" in the alleged RICO enterprise. Rather, they attempt to bolster such argument by pointing to documents that again appear only to disclose the actions of an attorney representing his or her client. We are unconvinced that the subject documents permit an inference that Barnes & Thornburg or Bridge directed the alleged association's affairs.

Plaintiffs also attempt to use the Firstmark and Capitol Securities bankruptcy to establish the direction or control element of the RICO liability test. According to plaintiffs, Barnes & Thornburg [and] Bridge recommended that the failing companies use Ancel & Dunlap as their bankruptcy counsel. Moreover, plaintiffs contend that Bridge met with various people in a meeting that included bankruptcy counsel, and that she and Ancel, among others, attended an August 1988 meeting of the Capitol Securities board of directors.

Plaintiffs point out that at that meeting Bridge was asked to, and did, comment on Capitol's "exposure on notes." Plaintiffs furthermore inform the Court that Barnes & Thornburg representatives copied Ancel & Dunlap on various letters. For example, Bridge apparently received an "incredible" letter from Jeffrey Rochwarger, Pl'.s Ex. at BT 058160; she sent the letter (or a copy thereof) to Ronald Hunter and carbon copied Steven Ancel (Ancel) of Ancel & Dunlap. Another letter on which Ancel was copied was one in which Barnes & Thornburg discussed its representation of Firstmark in relation to certain federal securities law litigation. Barnes & Thornburg described the limitations on its representation arising from the fact that the firm earlier served as legal counsel to Raffensperger in connection with Raffensperger's service as QIU for Firstmark in Firstmark's offering of subordinated notes. Barnes & Thornburg's representative copied Ancel on this letter.

Following consideration of all the bankruptcy activity on which plaintiffs rely to build their RICO case against Barnes & Thornburg and Bridge, we conclude that none of it, either singly or collectively, permits an inference that Barnes & Thornburg or Bridge directed the alleged association's affairs. The plaintiffs simply have not offered any evidence to establish that Barnes & Thornburg and/or Bridge were involved in any capacity other than the capacity of outside counsel.

Finally, plaintiffs allege that Barnes & Thornburg's own records "indicate that they were involved in a scheme to defraud and were concerned with avoiding liability." Pl.s' Opp'n Br. at 41. Plaintiffs offer five exhibits in the context of this argument. One is a memorandum regarding a discussion between a Barnes & Thornburg attorney and David Kleiman, counsel for Indiana National Bank. Pl.s' Ex. BT 57319. This conversation occurred on June 29, 1988, prior to the Capitol Securities/Firstmark bankruptcy and during the time that Barnes & Thornburg represented Capitol Securities,

and it encompassed discussions pertaining to the attorneys' clients.

The second exhibit contains undated notes written by a Barnes & Thornburg representative in which Firstmark's potential liability is considered. "Civil Rico" is one of the potential outcomes listed. Pl.s' Ex. BT 060653. The third and fourth exhibits plaintiffs submit also are handwritten notes from Barnes & Thornburg files. These notes apparently record in summary fashion discussions between and observations by various individuals regarding Firstmark. Pl.s' Exs. BT 61661, 61662.

An examination of these four exhibits leads the Court to agree with the defendants: the documents are merely examples of attorneys doing their job. Nothing more. We find no basis for drawing an inference that Barnes & Thornburg or Bridge directed or controlled an alleged RICO association. In their attempt to establish a prima facie RICO claim, plaintiffs have interpreted the language of the fourth exhibit to their advantage. Specifically, they have interpreted the Barnes & Thornburg representative's use of the word "we" as referring to Barnes & Thornburg, as well as other defendants. Read in this manner, the documents possibly could have some negative implications for Barnes & Thornburg.[4] However, a reading of the entire document clearly illustrates that the author's use of the word "we" refers not to Barnes & Thornburg, but rather to the client. In fact, on the preceding page of the document — the third exhibit in the context of this discussion — the author confirms this use of "we" when, in referencing Barnes & Thornburg, he writes, "we (B&T)." Thus, plaintiffs' argument does not create an issue of fact precluding summary judgment.

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[4] Even under plaintiff's proffered interpretation, we do not believe the memo would support a RICO claim against Barnes & Thornburg or Bridge.

Plaintiffs' fifth exhibit in this arena fares no better. That exhibit is a Barnes & Thornburg inter-office correspondence written by Bridge on October 3, 1988 — after Capitol and Firstmark filed for bankruptcy. Pl.s' Ex. BT 03688. In it, Bridge discusses prospectuses relating to Firstmark's subordinated notes. She states her belief that the November 1986 prospectus was "the most recent prospectus pursuant to which notes were actually sold." *Id.* She further opines that she is

> virtually certain that this prospectus was supplemented at the appropriate times to reflect year end and first quarter results although I have not yet located these supplements. As you will note, each of the prospectuses specifically points out in the "risk factors" section that the notes are not insured by any governmental agency.

Id.

Bridge's review of the prospectus — whether a review of Firstmark's conduct or Barnes & Thornburg's conduct — does not suggest that Barnes & Thornburg or Bridge were in the alleged association's chain of command. For purposes of this Entry, we assume the memo is reference to Barnes & Thornburg's earlier due diligence activity in relation to the subordinated notes, as plaintiffs appear to believe. Under this assumption, Bridge's review of the relevant prospectuses, even if that review encompasses Barnes & Thornburg's potential liability in the context of its work for Capitol Securities, hardly can be read to support plaintiff's RICO claim against these defendants. Interpreted as a hindsight "check" on Barnes & Thornburg's earlier work, the document indicates that Bridge believed not only that the relevant prospectus properly was supplemented, but also that the risks accompanying the notes were highlighted in the prospectuses. Neither a decision to review the work done for the client

having filed bankruptcy nor the particular conclusions reached in this case suggest that the law firm or its attorney was involved in directing or controlling the affairs of the alleged association.

To summarize, we find that plaintiffs have offered no evidence creating an issue of material fact that Barnes & Thornburg or Bridge conducted the affairs of a RICO enterprise. The evidence, viewed in the order in which the underlying events occurred, does not suggest that Barnes & Thornburg or Bridge either made decisions for the alleged RICO enterprise or carried decisions out. Rather, the evidence supports only the conclusion that Barnes & Thornburg was an outside law firm that assisted its client in its affairs. *Reves* tells us that this horizontal connection cannot be the basis for a § 1962(c) RICO claim. Having reached this conclusion, we need not consider the defendant's challenge to the second prong of the § 1962(c) test. Rather, we grant summary judgment in favor or Barnes & Thornburg and Bridge on plaintiffs' § 1962(c) claim.[5] We turn now briefly to address plaintiffs' § 1962(c) claim.

The Court earlier set forth the requirements of a RICO § 1962(d) claim for conspiracy to violate § 1962(c): (1) each defendant must agree to participate in the operation or management of the enterprise, (2) each defendant must agree to the commission of at least two predicate acts, and (3) each defendant must know that the predicate acts are part of a pattern of racketeering activity. *See* Entry at 3, Cause Number IP-92-0752-C-D/F (S.D. Ind. July 11, 1995).

---

[5] Plaintiffs have presented other pieces of evidence in an attempt to establish the requisite conduct on the part of Barnes & Thornburg and Bridge. The Court has considered each of plaintiffs' submissions and has concluded that the evidence does not support the inference the plaintiffs wish to be drawn therefrom.

We concluded in the previous discussion pertaining to § 1962(c) that plaintiffs presented no evidence suggesting that Barnes & Thornburg or Bridge directed or controlled the alleged association in fact. Similarly, no evidence submitted by the plaintiffs creates a genuine issue of material fact that these defendants *agreed* to direct or control the alleged RICO enterprise. Without such evidence, a RICO conspiracy claim against them cannot be maintained. Thus, summary judgment in favor of Barnes & Thornburg and Bridge on this issue is appropriate.

Plaintiffs finally contend in Count III of their fourth amended complaint that Barnes & Thornburg's and Bridge's activities violated Indiana RICO law, Ind. Code § 35-45-6-2(3). Differing slightly from 18 U.S.C. § 1962(c), the relevant Indiana provision provides that "[a] person who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in that enterprise through a pattern of racketeering activity" commits a crime. Previously, this Court held:

> With Indiana not yet having construed the provision and with Indiana courts looking to federal precedent to interpret the Indiana RICO Act, this Court believes that Indiana would adopt the *Reves* decision and hold that the relevant Indiana provision also requires a party to participate in the operation or management of the enterprise. Without further intimation by the Indiana courts of their intention to do so, this Court declines to give any independent substantive meaning to the Indiana law.

Entry at 15, Cause Number IP-92-0753-C (S.D. Ind. Oct. 6, 1994).

Consequently, plaintiffs' Indiana RICO claim against Barnes & Thornburg and Bridge cannot stand. The Court

grants defendants' motion for summary judgment on this count.

In conclusion, plaintiffs have failed to create a genuine issue of material fact that Barnes & Thornburg or Bridge directed or controlled the alleged association in fact. For this reason, defendant's motion for summary judgment is granted in all respects. Moreover, today's decision moots Barnes & Thornburg and Bridge's October 15, 1996 motion for judgment on the pleadings.

Dated this 8th day of May, 1997.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIRGINIA E. BROUWER, WESLEY BAXTER, ALBERTA E. HAESSIG, HARDY HICKS, JR., NATALIE HICKS, GERALD J. MOSS, VIOLA ROBINETTE, JUNE YOST, RUTH WILCHER, and all others similarly situated,	)	
Plaintiffs,	)	
-vs-	)	Cause No. IP-92-0753-C-D/F
LEONARD ROCHWARGER, JEFFREY A. ROCHWARGER, and ERNST & YOUNG,	)	
Defendants.	)	

ENTRY

This cause comes before the Court on Plaintiffs' motion to reconsider rulings concerning certain conspiracy claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). For the following reasons, the motion is DENIED.

Discussion

Previously, this Court dismissed plaintiffs' RICO conspiracy claims against three defendants. In particular, on October 6, 1994, we dismissed such claims against former defendant Raffensperger, Hughes and Company; on June 28, 1996, we dismissed plaintiffs' conspiracy claims against Ernst

& Young; and on May 8, 1997, we granted summary judgment in favor of Barnes and Thornburg and Catherine Bridge (Bridge), which decision included judgment for Barnes and Thornburg and Bridge on plaintiffs' RICO conspiracy claims.

On December 2, 1997, the United States Supreme Court decided *Salinas v. United States*, 139 L. Ed. 2d 352 (1997), and on December 19, 1997, plaintiffs filed the instant motion to reconsider. Plaintiffs contend that *Salinas* demonstrates that this Court has misinterpreted the criteria for a RICO conspiracy claim. According to the plaintiffs, the Supreme Court's recent interpretation of a RICO conspiracy claim mandates that we vacate our previous orders finding in favor of the aforementioned defendants on such claims.

In *Salinas*, the petitioner Mario Salinas (Salinas) was charged both with violating and conspiring to violate 18 U.S.C. § 1962(c). The jury acquitted Salinas on the substantive RICO count, but convicted him of conspiring to violate the substantive provision. Salinas argued before the Supreme Court that his RICO conspiracy conviction was improper because he had not agreed to commit two of the predicate acts required for a substantive RICO offense under § 1962(c). *Salinas*, 139 L. Ed. 2d 352, 364 (1997). Prior to *Salinas*, the appellate courts were split on whether the defendant could be convicted for RICO conspiracy if he, himself, had not committed or agreed to commit the requisite predicate acts. The First, Second and Tenth Circuits had decided the issue in the negative; eight other circuits had reached a contrary conclusion. *Id.* at 364.

Significant to this discussion, the elements of an § 1962(c) violation are (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity. *Id.* at 365 (citation omitted). Additionally, the RICO conspiracy provision stipulates that "[i]t shall be unlawful for any persons to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). Today, this Court must decide if the decision in *Salinas* directs amendment of the

standard we previously followed in analyzing RICO conspiracy claims based on § 1962(c).

In *Salinas*, the Supreme Court held that

> [a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.

Salinas, 139 L. Ed. 2d at 367 (citation omitted). The Court determined the evidence showed that Salinas' coconspirator "committed at least two acts of racketeering activity and that Salinas knew about and agreed to facilitate the scheme." *Id.* Hence, the Court concluded, the record supported Salinas' conviction under § 1962(d).

In earlier entries in this action, we held that in order to establish § 1962(d) claim for conspiring to violate § 1962(c), a plaintiff must establish

> "that each defendant agreed to participate in the operation or management of the enterprise, that each agreed to the commission of at least two predicate acts, and that each defendant knew that those predicate acts were part of a pattern of racketeering activity."

Entry, Cause Number IP-92-0753-C-D/F (S.D. Ind. July 10, 1995) (quoting *Schiffels v. Kemper Fin. Servs.*, 978 F.2d 344, 352 (7th Cir. 1992) (citations omitted)). Plaintiffs point to the aforequoted passage from *Salinas* and argue that it clearly shows a conspirator need not agree to participate in the operation or management of the enterprise in order to have conspired under § 1962(d). Pl.s' Mem. in Supp. of Mot. to Reconsider at 2. Rather, plaintiffs insist, a conspirator need only know of the object of the conspiracy and agree to facilitate it. *Id.*

Following an examination of the *Salinas* decision, the Court must disagree with plaintiffs' position. First, we note that the only question before the Supreme Court in *Salinas* was whether a RICO conspiracy claim based on § 1962(c) required that the defendant personally commit or agree to commit two acts of racketeering activity. The Court answered in the negative. The Court, however, did not consider the issue at the heart of plaintiffs' motion to reconsider. Specifically, the Court did not discuss whether agreeing to participate in the operation or management of an enterprise is an element of a RICO conspiracy claim based on § 1962(c). Plaintiffs admit as much but, nevertheless, argue that the broad language employed in *Salinas* is proof that the Supreme Court implicitly determined that a RICO conspirator need not agree both to conduct the affairs of an enterprise and to the commission of two or more predicate acts. Plaintiffs assert that agreeing to one or the other is sufficient. In support of their assertion, plaintiffs rely on the passage wherein the Court states that "[o]ne can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense." Pl.s' Reply Mem. at 3 (quoting *Salinas*, 139 L. Ed. 2d at 367).

This Court, however, believes the subject passage has a narrower application than that advanced by plaintiffs. Specifically, when the Court stated that a conspirator need agree to "facilitate only *some* of the acts leading to the substantive offense," we are convinced that the Court was referring to some

of the *predicate acts*; the Court was not including within its reach the distinct element requiring evidence that the conspirator agreed to participate in the operation or management of the enterprise.

Thus, we are persuaded that our earlier recitation of the elements of a RICO conspiracy claim based on § 1962(c) still is valid. Included therein is the RICO conspirator's agreement to conduct the affairs of the enterprise — that is, the conspirator must agree to participate in the operation or management of the enterprise. The Seventh Circuit confirmed the existence of such element in *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 352 (7th Cir. 1992) (holding that "[t]o allege a conspiracy to violate § 1962(c), Schiffels had to plead that each defendant agreed to conduct the affairs of an enterprise, that each agreed to the commission of at least two predicate acts, and that each defendant knew that those predicate acts were part of a pattern of racketeering activity."); *see also United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986) (holding that "a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise. If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy.").

Important to this discussion, the *Salinas* Court cited *Neapolitan* in its decision, making it clear that the Court was aware that at least some appellate courts had determined a RICO conspiracy required more than an agreement to the commission of predicate acts. Nevertheless, the Court did not in any way intimate that *Salinas* eviscerated those other elements. Hence, it appears that the Court left untouched the aspect of a RICO conspiracy claim pertaining to participating in the operation or management of an enterprise. Moreover, we are convinced that a defendant's agreement to participate in the operation or

management of the enterprise is an essential element of a RICO conspiracy claim. The Seventh Circuit has stated that

> [t]he provisions of section 1962 do not create "new crimes" but serve as the prerequisites for the invocation of increased sanctions for conduct which is proscribed elsewhere in both federal and state criminal codes. (Citation omitted.) . . . Section 1962(d), like the section's other provisions, is only applicable when the defendant has violated other laws *in a context that implicates RICO.*

Neapolitan, 791 F.2d at 495 (emphasis added). Necessitating an agreement to participate in the operation or management of the enterprise ensures that the nature of the defendant's involvement is such that the provisions of RICO are implicated.

In conclusion, Seventh Circuit precedent provided this Court with the elements of a RICO conspiracy claim based on § 1962(c). Because *Salinas* did not disturb those elements, we must deny plaintiffs' motion to reconsider.

Dated this 19th day of March 1998.

/s/ S. Hugh Dillin
S. Hugh Dillin
United States Judge
Southern District of Indiana

Supreme Court, U.S.
FILED
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No. 99-1637

IN THE

Supreme Court of the United States

RAFFENSPERGER, HUGHES & CO., INC., *et al.*,

Petitioners,

v.

VIRGINIA E. BROUWER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

HUGH G. BAKER, JR.
BAKER PITTMAN & PAGE
200 East Ohio St., Ste. 200
Indianapolis, Indiana 46204
(317) 686-1900

MICHAEL J. FREED
ANTHONY C. VALIULIS
Counsel of Record
DEBORAH S. BUSSERT
CHRISTOPHER J. STUART
MUCH SHELIST FREED DENENBERG
AMENT & RUBENSTEIN, P.C.
200 North LaSalle St., Ste. 2100
Chicago, Illinois 60601-1095
(312) 346-3100

GREGORY K. ARENSON
LAURENCE D. KING
KAPLAN KILSHEIMER & FOX LLP
805 Third Ave., 26th Fl.
New York, New York 10017
(212) 687-1980

Attorneys for Respondents

159828

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

27 pp

QUESTION PRESENTED

In formulating the "question presented" by their Petition, Petitioners claim that there is a "class of persons excluded from Section 1962(c) liability under *Reves*." (Petition, p.i.)[1] That supposedly being the case, Petitioners argue, that same "class of persons" should not be subject to liability for conspiracy under § 1962(d), the *Salinas* case notwithstanding.[2] Among other things, however, Petitioners' initial premise is wrong. Despite Petitioners' claims to the contrary, anyone from any "class of persons" can be liable under § 1962(c), provided he or she participates in the operation or management of the enterprise through a pattern of racketeering. This includes outside service providers. As recognized in *Reves*, such outside service providers (the relevant "class of persons") can be liable under § 1962(c) whenever they participate in the management or control of the enterprise. Similarly, any member of any class of persons can be liable as a member of a § 1962(d) conspiracy to violate § 1962(c), provided that he or she agrees to facilitate that violation.

Accordingly, the "question presented" can be better stated as follows:

> May a person be held liable under § 1962(d) of RICO for conspiring to violate § 1962(c) even though he or she has not agreed to participate personally in operating or managing the affairs of the corrupt enterprise but has nonetheless knowingly facilitated the commission of the § 1962(c) violation?

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1. *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

2. *Salinas v. United States*, 522 U.S. 52 (1997).

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Respondents Virginia E. Brouwer, *et al.*, respectfully request this Court to deny the Petition of Raffensperger, Hughes, and Company, Inc. ("Raffensperger") and Barnes & Thornburg and Catherine L. Bridge (together, "B&T") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

INTRODUCTION

In this case, the United States Court of Appeals for the Seventh Circuit held that, to be liable under RICO § 1962(d) for conspiring to violate § 1962(c), a person must agree "to knowingly facilitate the activities of the operators or managers" of a corrupt enterprise. (Appendix to Petition for Writ of Certiorari ("App.") 12a.) The Seventh Circuit based its holding squarely on this Court's opinion in *Salinas*. *Salinas*, of course, applied well-settled principles of general conspiracy law in rejecting a defendant's argument that, for § 1962(d) liability, a defendant must agree to personally commit two predicate acts. Rather, this Court upheld the conspiracy conviction of a defendant under § 1962(d) who did not agree to personally commit two predicate acts. Indeed, that defendant had even been acquitted of the substantive crime under § 1962(c). In upholding his conspiracy conviction, this Court found "ample evidence" that the defendant had conspired in the § 1962(c) violation, in that he knew about and agreed to facilitate the scheme of another. 522 U.S. at 66.

Here, relying on the reasoning of *Salinas,* the Seventh Circuit held that a § 1962(d) violation does not require an agreement by the conspirator to personally operate or manage the enterprise. Rather, all that is required is a knowing agreement to perform services of a kind which facilitate the

activities of those who are operating the enterprise in an illegal manner. The court therefore reversed the judgment of the district court, which had wrongly held that, to be in violation of subsection (d), one must *agree to personally participate in* the operation or management of the enterprise. In so holding, the Seventh Circuit was consistent with a number of its earlier cases with similar rulings.[3]

Contrary to Petitioners' arguments, this Court's opinion in *Salinas* neither created nor increased any alleged confusion about the extent to which so-called "outsiders" may be liable for conspiring to violate § 1962(c). Indeed, the only two Circuit Courts to address the issue since *Salinas* are in accord: one need not agree personally to operate or manage the enterprise for § 1962(d) liability.[4] Even before *Salinas*, several other courts had already reached the same conclusion. (*See infra,* n.8, 10.) Only two Circuit Courts have held the opposite, and they did so before *Salinas.* (*See infra,* n.6, 7.) Neither, therefore, has had the opportunity to review its position in light of that decision.

As a result, there is no reason for this Court to review this case. The Circuits are simply not in conflict on the effect of *Salinas*. Nor is there any conflict or inconsistency between the decisions of this Court and the opinion of the Seventh Circuit. Finally, several of the arguments advanced in the Petition were never raised or considered in the courts below and thus are not ripe for consideration now. Accordingly, the Petition should be denied.

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3. *See, e.g., MCM Partners, Inc. v. Andrews-Bartlett & Assoc.,* 62 F.3d 967 (7th Cir. 1995); *United States v. Quintanilla,* 2 F.3d 1469 (7th Cir. 1993).

4. *Brouwer, et al., v. Raffensperger, Hughes & Co., et al.,* (App. 1a); *United States v. Posada-Rios,* 158 F.3d 832 (5th Cir. 1998), *cert. denied,* 526 U.S. 1031 (1999).

COUNTERSTATEMENT OF THE CASE

Respondents disagree with Petitioners' Statement of the Case because it is inaccurate and incomplete.[5] Respondents therefore submit the following.

This class action was brought on behalf of thousands of investors who held subordinated investment notes issued by Firstmark Corporation, an Indianapolis-based financial holding company. Firstmark filed for bankruptcy in 1988. The investors were the victims of a conspiracy of individuals and entities, including Petitioners, who sold them millions of dollars of worthless notes while systematically draining Firstmark, the issuer, of cash and other valuable assets.

Contrary to Petitioners' characterization of the facts, each of them played a pivotal role in the conspiracy. Petitioners' actions directly facilitated the fraudulent sale of the notes. None of them can be fairly characterized as only "peripherally involved."

The RICO conspiracy began in 1981, with a "going private" transaction whereby Firstmark became the wholly-owned subsidiary of Rockmont Corporation. This transaction created a crushing debt for Rockmont, which repaid itself through large cash dividends from Firstmark. In this way, by 1987, the conspiracy had stripped Firstmark of almost $8 million.

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5. Petitioners assert that the district court made certain factual findings which Respondents purportedly did not and presumably now cannot dispute. That is not true — but also not relevant to the petition. At this point it is sufficient that the Seventh Circuit merely accepted the facts favorable to the Respondents and as pled in the complaint. App. 2a, 16a.

Petitioners joined the conspiracy in 1985. At that time, the NASD amended its rules regarding the sale of securities by its members, requiring Firstmark to retain a Qualified Independent Underwriter ("QIU") to perform due diligence on its registration statement and to set a minimum yield for the notes. Raffensperger agreed to act as the QIU. Among other things, B&T agreed to assist in the due diligence review that was used to set the minimum yields. *Thus, without the participation of Petitioners, the notes could not have been sold.*

From their due diligence investigation, Raffensperger and B&T learned about the fraudulent note scheme, learned that Firstmark's assets were being siphoned off to Rockmont, learned that notes were being sold to investors solely to create cash flow to pay interest on old notes, and learned that there was virtually no chance that the notes could ever be repaid. Despite this knowledge, Petitioners agreed to hide the true facts and to assist in the fraudulent sale of notes.

As QIU, Raffensperger had absolute control over the notes' minimum yields. It used that power to further the conspiracy and its goals by intentionally setting the yields deceptively low. The low yields made the notes appear less risky when compared to yields offered on other, similar securities. Moreover, because of the due diligence investigation performed by B&T on behalf of Raffensperger, both were aware that the yields bore no relationship to the actual return that an investor was likely to obtain or the inherent risk of the notes. Instead, the yields were expressly calculated to hide the notes' substantial risk.

As for B&T, from 1985 until Firstmark's bankruptcy in 1988, B&T was far more that a "mere provider" of "legal services." Indeed, B&T filled at least three crucial roles that allowed the conspiracy to pursue its goal of draining the assets of Firstmark. As with Raffensperger, without B&T the conspiracy could not have functioned in the manner it did, for as long as it did, or as successfully.

First, although B&T knew that Firstmark was financially incapable of repaying the notes, it assisted Raffensperger in setting the deceptive minimum yields. Second, B&T helped conceal the conspiracy and its fraud, by concealing vital information from the public. For example, in September 1987, B&T ensured that the Indiana Securities Commission would not take any public or private action against Firstmark, so that investors would remain ignorant of Firstmark's precarious financial condition and the high risk of their notes.

Finally, once the conspiracy could no longer finance its operations through the fraudulent note sales, B&T facilitated the sale of Firstmark to another of B&T's clients, Capitol Securities. In so doing, B&T assisted in the fraudulent transfer of another $10 million of Firstmark's assets. As a result, Firstmark was left little more than a shell and the investors, most of whom were elderly and living on fixed incomes, were out $57 million.

Throughout, Petitioners knew what they were doing and the likely result. Petitioners each had complete access to Firstmark's financial records and all details relating to the sale of the notes. Petitioners therefore had full knowledge of Firstmark's dire and deteriorating financial condition, the fraudulent nature of the note sales, and the draining of Firstmark's assets. Because they had access to Firstmark's

records, Petitioners knew that the note sales they were facilitating created the appearance of solvency for Firstmark. Petitioners knew that the co-conspirators used this false appearance of solvency to move millions of dollars of assets out of Firstmark. Petitioners also knew that, at the time they were facilitating the note sales, there was virtually no chance that investors could ever recoup their investments.

Accordingly, although neither Raffensperger nor B&T directly operated or managed the enterprise, they were far more than innocent outside service providers. Instead, each of them had an important and necessary role in the conspiracy and in accomplishing its goals. Under well-settled conspiracy law, even apart from RICO, each of them could be liable for the violations of their co-conspirators. A similar result under RICO, as found by the Seventh Circuit, is not a "new rule" of law. Nor is it unfair.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CURRENT CONFLICT AMONG THE CIRCUITS

A. Any Disagreement Was Before *Salinas*

Petitioners urge this Court to grant a writ of certiorari because, they claim, the Circuits are split on the question presented. According to Petitioners, the law of certain Circuits differs with respect to application of the *Reves* "operation or management" test to RICO conspiracy claims. They argue that the holdings of the Third and Ninth Circuits are in direct conflict with those of the Second, Fifth, Seventh

and Eleventh Circuits on whether liability can be imposed on "outsiders who have not agreed to direct the affairs of the enterprise." (Petition, p. 11.) This purported conflict, Petitioners assert, has been "festering for years," requiring review by this Court to "get all the Circuits in line." (Petition, pp. 11-12.)

Before *Salinas,* certainly, it would have been fair to argue that a split in the Circuits existed on the question. The Third Circuit[6] and the Ninth Circuit[7] had both held that a defendant could not be liable for conspiracy to violate § 1962(c) unless she or he agreed to take some personal part in directing the RICO enterprise. These courts had reasoned that liability should not attach for conspiracy to do something for which a person could not be directly liable under the substantive clause of the statute.

In contrast, even before *Salinas,* the Second,[8] Seventh[9] and Eleventh Circuits[10] had come to the opposite conclusion: a defendant could be liable for conspiracy to violate § 1962(c) as long as some member of the conspiracy agreed to direct the affairs of the enterprise through a pattern of racketeering.

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6. *United States v. Antar,* 53 F.3d 568 (3d Cir. 1995).

7. *Neibel v. Trans World Assurance Co.,* 108 F.3d 1123 (9th Cir. 1997), and *Webster v. Omnitrition Int'l, Inc.,* 79 F.3d 776 (9th Cir. 1996).

8. *Napoli v. United States,* 45 F.3d 680 (2d Cir. 1995).

9. *MCM Partners v. Andrews-Bartlett & Assoc.,* 62 F.3d 967 (7th Cir, 1995).

10. *United States v. Starrett,* 55 F.3d 1525 (11th Cir. 1995).

These courts concluded, based both on this Court's interpretation of the statute and on general conspiracy principles, that a RICO conspiracy does not require proof that all of the alleged co-conspirators conducted or participated in the conduct of the affairs of the enterprise to the extent mandated by *Reves*. According to these courts, such a requirement would entail a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy, where agreeing to a prescribed objective is sufficient.[11]

B. After *Salinas* The Only Courts To Consider The Issue Are In Accord

Since this Court's decision in *Salinas*, only two Circuits have had the opportunity to consider what must be alleged and proved to establish § 1962(d) liability for conspiring to violate § 1962(c). Those two courts, the Fifth Circuit[12] and the Seventh Circuit in this case, agree that, based on the reasoning in *Salinas*, a defendant can be liable for conspiring to violate § 1962(c) even if he or she did not *personally* agree to operate or manage the corrupt enterprise. Indeed, the Fifth Circuit directly considered the split that had existed before *Salinas* and determined that, in light of that decision, the Third and Ninth Circuits' position was no longer tenable. 158 F.3d at 857.

Accordingly, the actual question presented by this Petition is whether *Reves* or *Salinas* controls liability under § 1962(d). As to this, there is no split in the Circuits. Only

11. *See, e.g., United States v. Quintanilla*, 2 F.3d 1469, 1484-85 (7th Cir. 1993).

12. *United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998).

two circuits have considered it and both agree. Both say *Salinas* controls. Thus, there is no reason for this Court to take up the matter now, certainly not before the Third and Ninth Circuits have an opportunity to reexamine the issue in light of *Salinas*. Indeed, because of the clear directive in that case that general conspiracy principles apply to RICO conspiracies, it is very likely that those courts will follow the Fifth and the Seventh Circuits and hold that *Salinas* controls. Even if they do not, until they have the issue presented to them for decision, it would be premature for this Court to consider it. Certainly, a split of authority cannot be created by mere speculation that the Third and Ninth Circuits will disregard the reasoning of *Salinas* and reiterate their prior, erroneous rulings.

II.

THE SEVENTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT

A. *Reves* Does Not Apply To This Case

With the exception of the Third and Ninth Circuits, as noted above, every Circuit Court that has reviewed this issue has held, like the Seventh Circuit here, that ordinary conspiracy principles apply to RICO conspiracies. Thus, a clear majority believe that liability can be imposed on a RICO conspirator even if that person did not personally agree to operate or manage the RICO enterprise. *Napoli,* 45 F.3d at 683 (petitioners guilty because they provided substantial assistance to those who actually conducted the affairs of the nefarious enterprise); *Starrett*, 55 F.3d at 1547 (defendant guilty who manifested agreement to participate in corrupt enterprise; *Reves* test does not apply to RICO conspiracy);

MCM Partners, 62 F.3d at 979 (a defendant may conspire to violate section 1962(c) even if that defendant could not be characterized as an operator or manager of a RICO enterprise under *Reves*); *Posada-Rios*, 158 F.3d at 858 (defendant may be convicted of RICO conspiracy even if he only participated at one level of the conspiracy and only played a minor role).

Petitioners argue, however, that the Seventh Circuit's opinion "excessively extend[s] *Salinas* and essentially nullif[ies] *Reves*." (Petition, p. 13.) This argument is unconvincing, however, in the face of comments in *Salinas* that one can violate § 1962(d) even if he or she could not be guilty of the underlying substantive offense. 522 U.S. at 64, *citing United States v. Rabinowich*, 238 U.S. 78, 86 (1915). This is especially true since *Salinas* made it clear that the RICO conspiracy statute is actually broader than the general conspiracy statute. 522 U.S. at 63-64.

Petitioners also claim that the facts of *Reves* and those of this case are "closely parallel." (Petition, p. 13.) Even if true, that would not be relevant since *Reves* only dealt with § 1962(c) and not § 1962(d). As is often the case in a conspiracy, certain conduct that would not subject one to substantive liability could still result in liability as a conspirator. Moreover, the facts of *Reves* and *Salinas* are not that close. The acts of the auditors in *Reves* were not *essential* to the scheme, as were the acts of Petitioners here. Again, and most importantly, *Reves* simply had nothing to do with conspiracy principles — it dealt solely with whether an outside auditor, on the facts presented, could be held liable for a § 1962(c) violation, one of RICO's substantive offenses. Thus, there is nothing in *Reves* that addresses the issues in this case. Accordingly, Petitioners' lengthy analysis of *Reves* is irrelevant.

Ultimately, Petitioners' petition is based on a false dichotomy. Under Petitioners' view of the RICO world, there exist only polar opposites, with nothing in between. At one end is the "operator or manager" of the enterprise, who Petitioners concede can be liable under both subsections (c) and (d).[13] At the other extreme is the pure outside service provider who does not operate or control the enterprise. He or she, Petitioners assert, can never be liable under either section.

To Petitioners, if you do not control or manage the enterprise, and thus cannot be liable for the substantive § 1962(c) offense, then you cannot be liable under § 1962(d) as a conspirator for facilitating that offense. But nothing in either the language or the legislative history of RICO compels such a result.[14] Thus, there is nothing in the Seventh Circuit's holding that is at odds with settled law.

B. The Seventh Circuit Followed *Salinas*

Petitioners claim that the Seventh Circuit should have grafted the *Reves* "operation or management" test onto § 1962(d), and that its failure to do so is supposedly error. In essence, Petitioners believe that *Reves* controls instead of *Salinas,* even though *Reves* was earlier and did not address conspiracy liability, while *Salinas* specifically dealt with the

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13. Given the factual allegations, even if *Reves* did apply, at the very least Raffensperger would still be liable because it directly controlled the affairs of the enterprise by setting yields as QIU.

14. *See, e.g., Fortney v. Kuipers,* 1999 WL 102772 (N.D. Ill. 1999) (finding liable attorney who advised client how to conceal assets from judgment creditor under § 1962(d), even though he did not operate or manage the enterprise).

requirements for a conspiracy claim under RICO. Obviously, *Salinas* must control and it holds that a RICO conspiracy does not require a greater showing than does a conventional conspiracy. Indeed, in at least one respect, a RICO conspiracy requires less proof, because no overt act is required. 522 U.S. at 63.

As *Salinas* makes clear, RICO was intended to reach everyone who knowingly agrees to facilitate a RICO violation, not merely those who commit or agree to commit the elements of the substantive offense, such as the predicate acts or operating or managing an enterprise. As under traditional conspiracy law, a conspirator need only agree that some member of the conspiracy will commit the crime. Nothing in *Reves* is contrary, since it had nothing to do with conspiracy under § 1962(d). *Reves* did not even attempt to interpret that section or define to whom it could be applied. And, contrary to Petitioners' claim that "nothing in *Salinas* justifies using conspiracy law to expand the 'universe' of potential conspirators beyond the boundaries prescribed" by *Reves* (Petition, p. 21), the very reasoning underlying *Salinas* amply supports such use.

Salinas expressly stated that a RICO conspiracy is governed by the same general principles as any other conspiracy. The Seventh Circuit's holding here is fully consistent with those general conspiracy principles. Those principles were discussed at length in *Salinas*. Because "a conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense," it follows that a § 1962(c) conspirator need not agree personally to operate or manage the corrupt enterprise, which is one part of the substantive offense. 522 U.S. at 63, *citing United States v. Socony Vacuum Oil Co.,* 310 U.S.

150, 253-54 (1940). As long as everyone involved agrees to pursue the same criminal objective, they may divide up the work any way they see fit. Each will still be responsible for the acts of the others. 522 U.S. 64, *citing Pinkerton v. United States,* 310 U.S. 150 (1940).

A person may even be liable for conspiracy when he or she is "incapable of committing the substantive offense." 522 U.S. at 64, *citing United States v. Rabinowich,* 238 U.S. 78, 86 (1915). This principle is particularly applicable here. Thus, even if Petitioners could not be liable under § 1962(c) because they did not agree to operate or manage the corrupt enterprise, as they claim, they can still be liable for conspiring with others to do so.

Nor does the Model Penal Code support Petitioners' position. According to them, under the MPC, if one agrees to aid in the commission of an offense, he or she is guilty of conspiracy. If, however, the offense is completed, then that same person would be guilty of being an accomplice. Petitioners then make a logically unwarranted leap. They argue that one who cannot be an accomplice cannot be a conspirator. According to them, because an outsider supposedly cannot be liable for another person's operation or management of a RICO enterprise under an accomplice theory merely by facilitating the offense, then that outsider cannot be guilty of § 1962(d) conspiracy. (Petition, p. 24.)

The flaw in Petitioners' argument here is in equating an accomplice with a conspirator, distinguished only by whether the crime is completed. They are not the same. The universe of conspirators is broader than the universe of failed accomplices. As *Salinas* made clear, to be guilty of conspiracy, under either RICO or the MPC, all that is required is that one knowingly agree to facilitate the crime:

> When Congress passed RICO in 1970, . . . , the American Law Institute's Model Penal Code permitted a person to be convicted of conspiracy so long as he "agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime." [Citation omitted.] As the drafters emphasized, "so long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree 'to commit' the crime."

522 U.S. at 64-65, *citing* Model Penal Code, § 5.03(1)(a) (1962).

As this Court also noted, for liability to attach, all one needs to do is to adopt a criminal goal:

> [a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.

522 U.S. at 65.

Again, Petitioners' position is that conspiracy and accomplice theory are virtually the same. They are wrong. Although a failed accomplice may be liable as a conspirator, not every conspirator is merely a failed accomplice. Conspiracy liability encompasses accomplice theory but goes

beyond it, to capture anyone who knowingly facilitates a crime:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Model Penal Code, § 5.03(1).

In the case before this Court, Petitioners knew about and agreed to facilitate Firstmark's fraudulent scheme. As *Salinas* makes clear, "this is sufficient to support a conviction under §1962(d)." 522 U.S. at 66.

C. The Seventh Circuit's Decision Does Not Broaden The Purported Class Of Persons Subject To Liability Under Section 1962(c)

1. There is no special class of persons subject to § 1962(c) liability.

Petitioners argue that the *Reves* operation or management test "defines the universe of people who may be conspirators." (Petition, p. 21, emphasis omitted.) Petitioners claim that the Seventh Circuit erred because it impermissibly broadened the purported "class of persons" subject to liability under § 1962(c). (Petition, p. 17.) Petitioners' argument,

however, is based on a false premise. There simply is no "class of persons" who are either necessarily subject to § 1962(c) liability or excluded from such liability. The potential for § 1962(c) liability depends not on status, as Petitioners assert, but on conduct. Unlike the crime of embezzlement, for example, where only persons who come into possession of the property of another by virtue of their employment can be guilty of the crime,[15] anyone can be liable under § 1962(c) if they engage in the prohibited conduct. Thus, under *Reves,* even an outside service provider can be liable under § 1962(c) if he or she manages or operates the enterprise. 507 U.S. at 184-85. It is not the person's status as an outside service provider that is relevant. It is that person's conduct.

Petitioners have little support for their "class of persons" argument. Initially, they point to legislative history, stating that it "contains no suggestion that Congress intended to undo through the conspiracy provision the categorical limitation it imposed on the class of persons who could be liable substantively under Section 1962(c)." (Petition, p. 17.) Since there is no such "categorical limitation" in the statute or elsewhere, however, the lack of discussion of the subject is not surprising. Nowhere in either RICO case law or its legislative history can Petitioners find any direct support for their proposition that, unlike under general conspiracy law, RICO conspiracy liability is limited to a special class of persons.

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15. *United States v. Bailey,* 734 F.2d 296 (7th Cir.), *cert. denied,* 469 U.S. 931 (1984).

2. The antitrust laws do not support Petitioners' position.

Petitioners assert that the antitrust laws also provide support for inferring that Congress intended to apply the *Reves* "operation or management" test to conspiracy claims, thereby limiting the class of persons subject to liability. (Petition, p. 18.) In support, they claim that RICO was modeled on the Clayton Act. Based on this assertion, they contend that general antitrust principles also apply to RICO cases. But Petitioners' basic assumption is simply wrong. While RICO § 1964(c), the section that provides for private civil remedies, including treble damages, was modeled on the Clayton Act,[16] Congress did not model the entire RICO statute on either the Clayton Act or any other antitrust law. None of Petitioners' cases say otherwise.[17] Accordingly, there is no basis for wholesale importation of antitrust principles into RICO cases.

To the contrary, there is direct authority suggesting that one must exercise caution in applying general antitrust theories to RICO cases. This Court has rejected the idea of a "racketeering injury" requirement for civil RICO.[18] In so doing, it reversed the Second Circuit, which had imported the racketeering injury idea from antitrust standing

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16. 15 U.S.C. § 15; *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987).

17. In footnote 6 of their Petition, Petitioners imply that, based on the Clayton Act, this Court rejected the requirement of a prior criminal conviction for civil liability under RICO. This suggestion is disingenuous at best; the cited case (*Sedima*) does not support it.

18 . *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

principles. The Court noted that "in borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid" by enacting a broad civil RICO remedy. 473 U.S. at 498-99.

Perhaps most importantly, conspiracy under the antitrust laws is different from a § 1962(d) conspiracy. Under RICO, of course, conspiracy is contained in a separate subsection making it a violation to conspire to commit any of several other offenses. In contrast, under the Sherman Act, conspiracy (to restrain trade) *is* an offense. Accordingly, the antitrust laws are irrelevant to the proper interpretation of § 1962(d).

With respect to the asserted limited class of persons, moreover, the cases cited by Petitioners[19] do not support them. In *Brown,* for example, the court merely held that an attorney acting solely on behalf of his client could not be individually liable under the antitrust laws unless he himself intentionally furthered anticompetitive goals. In so doing, the court noted, "if the attorney goes beyond the role of pure legal advisor, however, and acting by himself or jointly with others makes policy decisions for the corporation, he subjects himself to liability. . . ." 783 F.2d at 646-47. The court did not say, however, that making policy decisions for the corporation was the only way an attorney could be liable under the antitrust laws. That was just one way an attorney could intentionally further the anticompetitive goals of a client. There are certainly others. Again, it is conduct, not status, that is determinative.

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19 . *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n,* 358 F.2d 115, 118 (9th Cir. 1966); *Brown v. Donco Enters., Inc.,* 783 F.2d 644 (6th Cir. 1986).

III.

SEVERAL OF PETITIONERS' ARGUMENTS WERE NEVER RAISED OR CONSIDERED IN THE COURTS BELOW

Petitioners' arguments concerning the antitrust laws and the Model Penal Code were neither raised nor considered by the courts below. Accordingly, these arguments demonstrate that the issues presented by this case are not ripe for this Court's review. Until all of the applicable arguments have been fully addressed by the Circuit Courts of Appeals in light of this Court's decision in *Salinas,* certiorari is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

- MICHAEL J. FREED
ANTHONY C. VALIULIS
Counsel of Record
DEBORAH S. BUSSERT
CHRISTOPHER J. STUART
MUCH SHELIST FREED DENENBERG
AMENT & RUBENSTEIN, P.C.
200 North LaSalle St., Ste. 2100
Chicago, Illinois 60601-1095
(312) 346-3100

HUGH G. BAKER, JR.
BAKER PITTMAN & PAGE
200 East Ohio St., Ste. 200
Indianapolis, Indiana 46204
(317) 686-1900

GREGORY K. ARENSON
LAURENCE D. KING
KAPLAN KILSHEIMER & FOX LLP
805 Third Ave., 26th Fl.
New York, New York 10017
(212) 687-1980

Attorneys for Respondents

(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1999

RAFFENSPERGER, HUGHES & CO., INC.,
BARNES & THORNBURG, AND CATHERINE L. BRIDGE,

Petitioners,

v.

VIRGINIA E. BROUWER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

ROGER L. TAYLOR
THOMAS E. DUTTON
JILL C. ANDERSON
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Petitioner Raffensperger, Hughes & Co.

PHILIP ALLEN LACOVARA
Counsel of Record
JAMES D. HOLZHAUER
MIRIAM R. NEMETZ
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioners Barnes & Thornburg and Catherine L. Bridge

Additional Counsel Listed on Inside Cover

15pp

WILLIAM P. WOODEN
MARY TITSWORTH CHANDLER
Wooden & McLaughlin, LLP
1600 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

LAUREN J. ROSENBLUM
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019

Additional Counsel for Petitioners
Barnes & Thornburg and Catherine L. Bridge

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REPLY BRIEF FOR PETITIONERS

In their Brief in Opposition, respondents make three key concessions that underscore the reasons for granting the Petition. First, they concede that in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1992), this Court ruled that outside service providers can be liable under Section 1962(c) of RICO *only if* they "participate in the management or control of the enterprise." Opp. i. Second, they concede that petitioners here did not manage or control the RICO enterprise and thus were properly exonerated from direct liability under Section 1962(c). And, third, they concede that the Circuits are currently in conflict on the question whether the "operation or management" test that *Reves* established as a prerequisite to liability under Section 1962(c) also applies to claims under Section 1962(d) of conspiracy to violate that provision.

Respondents speculate, however, that this acknowledged Circuit conflict will eventually disappear in light of *Salinas* v. *United States*, 522 U.S. 52 (1997). Dismissing *Reves* as "irrelevant," they contend that *Salinas* "[o]bviously * * * controls" and requires a holding that the "operation or management" test does not apply to conspiracy claims. But by setting aside *Reves* because it was "earlier [than *Salinas*] and did not address conspiracy liability" (Opp. 11), respondents sidestep the central question underlying the Petition. This Court ruled in *Reves* that Congress made a legislative judgment to exclude from liability under Section 1962(c) those persons who merely *facilitate* the corrupt operation or management of an enterprise. How can it comport with this legislative intent to impose conspiracy liability on those who merely *agree to facilitate* the operation or management of the enterprise? Respondents do not deny that the rule for which they argue would render *Reves* an aimless relic and frustrate the legislative judgment on which it rests.

In arguing that *Salinas* somehow forecloses the application of the *Reves* "operation or management" test in conspiracy cases, respondents never address the fact that the Court in *Salinas* emphasized that Salinas was "managing" the enterprise.

522 U.S. at 55. And they utterly ignore this Court's decision just a few weeks ago in *Beck* v. *Prupis*, 529 U.S. ___ (2000), which holds that, in a RICO *civil* damage case like this one, the "general conspiracy principles" that inform the scope of liability are those found in civil law, not the criminal conspiracy doctrines applicable in *Salinas*.

Finally, respondents do not even try to deny that the question presented by the Petition is important and recurring.

I. RESPONDENTS CONCEDE THAT PETITIONERS DID NOT "CONDUCT OR MANAGE" THE ENTERPRISE, SO THE ISSUE IS SQUARELY FRAMED.

Although respondents offer a slanted portrayal of petitioners' role in the events, the case comes before this Court without any dispute about the dispositive facts. The court of appeals (Pet. App. 2a) accepted the district court's findings, in granting summary judgment, that B&T had neither participated nor agreed to participate in the operation or management of the enterprise (*id.* at 58a), and that respondents failed to plead facts showing such participation or agreement by Raffensperger (*id.* at 18a, 23a). Respondents now concede that "***neither Raffensperger nor B&T directly operated or managed the enterprise***." Opp. 6 (emphasis added). Instead, they assert only that petitioners engaged in the kind of conduct that *Reves* held insufficient to create direct liability under Section 1962(c) — that petitioners "assisted" or "facilitated" the allegedly wrongful conduct of the enterprise's affairs. See, *e.g.*, Opp. 3 ("Petitioners' actions directly *facilitated* the fraudulent sale of the notes."); *id.* at 5 ("B&T * * * *assisted* Raffensperger in setting the deceptive minimum yields.") (all emphasis added).

There is, therefore, no dispute that our Petition perfectly frames the legal issue posed by *Reves* and *Salinas*: whether a defendant exonerated under Section 1962(c), because he is alleged only to have *facilitated* (but not to have participated in) the operation or management of an enterprise through a pattern

of racketeering, nevertheless may be held liable under Section 1962(d) for allegedly *agreeing to facilitate* (but not to participate in) the operation or management of the enterprise.

II. THE CIRCUIT CONFLICT PERSISTS.

As we explained in our Petition, the six Circuits that have considered the question presented by this petition have disagreed about its answer. The Third and the Ninth Circuits have concluded that *Reves* precludes liability for conspiring to violate Section 1962(c), unless the defendant agreed to participate personally in operating or managing the RICO enterprise. The Second, Fifth, and Eleventh Circuits, like the Seventh Circuit in the decision below, have held the opposite.

Respondents agree that, before *Salinas*, it "certainly * * * would have been fair to argue that a split in the Circuits existed on the question." Opp. 7. They argue, however, that this conflict is now illusory, because the Third and Ninth Circuits can be expected to change their position in response to *Salinas*. That speculation is unfounded.

First, *Salinas* did not change the governing law in the Third and Ninth Circuits. Even before *Salinas*, both Circuits had already adopted the rule this Court upheld in *Salinas* — that a defendant need not agree personally to commit two predicate acts in order to be liable under § 1962(d) for conspiracy to violate § 1962(c). See, *e.g.*, *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985) ("to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts"); *United States* v. *Morelli*, 169 F.3d 798, 802 n.3 (3d Cir. 1999) (noting that *Adams* rule was upheld in *Salinas*). The Ninth Circuit, too, had anticipated the result reached in *Salinas*. See, *e.g.*, *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997). Indeed, the Ninth Circuit derived that rule by applying the same general principles of conspiracy law that this Court later relied upon in *Salinas*. See *United States* v. *Brooklier*, 685 F.2d 1208, 1220 & n.6 (9th Cir. 1982).

Thus, these Circuits have already found the rule adopted in *Salinas* to be perfectly consistent with a requirement that each conspirator must have agreed to participate personally in operating or managing the enterprise. There is, therefore, no reason to believe that *Salinas* will cause them to change their views about the continuing validity of their position on the issue raised in this Petition.

Second, despite respondents' argument, the court below candidly recognized that *Salinas* did not expressly or implicitly answer the question raised by the Petition. See Pet. App. 7a ("*Salinas*, focused as it was on the issue of predicate acts, is not directly helpful in answering the question."). And as we have noted, *Salinas* involved a defendant whom this Court expressly characterized as a manager of the corrupt enterprise. *Salinas*, moreover, applied principles of *criminal* conspiracy law. But as we discuss further below, this Court's recent decision in *Beck* v. *Prupis* holds that the scope of *civil* and *criminal* conspiracy under RICO are quite different, and that the contours of *civil* liability for RICO conspiracy must be determined with reference to principles of *civil* conspiracy developed at common law.

Thus, in the 1999 editions of the two leading treatises on RICO, commentators writing since *Salinas* recognize that a clear conflict among the Circuits persists on the issue posed here. See Pet. 8 & n.2. Ignoring this authority, respondents' argument that *Salinas* obliterated this explicit conflict is just wishful thinking.

III. AS SHOWN BY THE COURT'S RECENT DECISION IN *BECK* V. *PRUPIS*, *SALINAS* DID NOT RESOLVE THE ISSUE LEFT OPEN BY *REVES*.

In our Petition, we explained how the ruling below, which purported to "reconcile *Salinas* and *Reves*" (Pet. App. 12a), would "excessively extend *Salinas* and essentially nullify *Reves*." Pet. 13. Respondents dismissively retort that "*Reves* is irrelevant" (Opp. 10) and "*Salinas* must control" (*id.* at 12).

Neither of these simplistic responses resolves the genuine tension between *Reves* and *Salinas*.

1. Respondents contend that the principles of *Reves* do not apply here because *Reves* "simply had nothing to do with conspiracy principles." Opp. 10. Of course, it would be just as apt to observe that *Salinas* had "nothing to do" with the liability of a person who was not an operator of the enterprise. But these observations beg the question, which is whether the "operation or management" test *should* apply to conspiracy claims. Respondents do not refute our arguments that applying this test to conspiracy claims is necessary to give effect to the intent of Congress.

First, respondents never acknowledge the "insider/outsider" distinction that this Court recognized in *Reves* as fundamental to the legislative plan. In *Reves*, the Court examined the text and legislative history of RICO and concluded that Congress had decided to limit civil RICO liability only to "insiders" who personally conduct the affairs of the corrupt enterprise or participate personally in managing its affairs. By contrast, the Court concluded that Congress decided not to make "outsiders" liable for merely aiding, facilitating or encouraging those violations. See, *e.g.*, 507 U.S. at 185 ("§ 1962(c) cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs."). Respondents concede (Opp. 16) that nothing in the legislative history reflects an intention to broaden through the conspiracy provision the class of persons who can be liable for a section 1962(c) violation.

Because they cannot demonstrate any congressional intent to sweep away the insider/outsider distinction in a conspiracy case, respondents simply deny that the distinction exists. They assert that "an outside service provider can be liable under Section 1962(c) *if he or she manages or operates the enterprise*." Opp. 16 (emphasis added). But respondents'

grudging concession is fundamental, because, as *Reves* held, anyone who operates or manages the enterprise *becomes* an insider. *See* 507 U.S. at 179 ("RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required."). The point is that, when it enacted Section 1962(c), Congress intended to capture such inside operators, but not mere outside facilitators.

Even the court of appeals recognized that, "[i]ntuitively, it seems wrong that a person could conspire to violate a law which does not apply to him." Pet. App. 10a; see also *United States* v. *Antar*, 53 F.3d 568, 581 (3d Cir. 1995) (conspiracy liability "should not attach" when "the defendant is not conspiring to do something for which he or she could be held liable under the substantive clause of the statute"). Such a rule not only is "[i]ntuitively * * * wrong," but also amounts to an absurd construction of the statute. Respondents do not explain how it would comport with congressional intent to hold mere outside facilitators liable for conspiracy, when Congress has determined that such persons do not bear any substantive liability for the completed offense.

Second, respondents do not dispute that the approach for which they argue would "risk eviscerating *Reves*." *Antar*, 53 F.3d at 581. Indeed, their analysis confirms this conclusion. According to respondents (and the court below), "all that is required is a knowing agreement to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner." Opp. 1. *Reves*, however, *exculpates* from civil RICO liability those who merely "facilitate" the activities of persons who are operating an enterprise illegally. By contrast, respondents' proposed rule *inculpates* those who merely *agree* to do so. Their approach is simply a cleverly contrived way of trying to overrule *Reves*. Virtually any RICO enterprise will have several persons in and around its affairs. If labeling each one a "conspirator" were sufficient to impose liability on them, this theory would create liability for very same persons whom Congress intended,

according to *Reves*, to place outside the realm of direct RICO liability under Section 1962(c).

The Court's opinion in *Salinas* does not even mention *Reves*. It is unrealistic to infer from this silence that the Court intended, *sub silentio*, to nullify the "operation or management" test it had recently established in *Reves*. Respondents do not begin to justify their contrary inference that *Salinas* implicitly overruled *Reves* for multi-defendant "conspiracy" cases indistinguishable from *Reves*.

2. Nevertheless, respondents, like the court below, rest their case entirely on *Salinas*, contending that *Salinas* "[o]bviously * * * must control" (Opp. 12). In relying exclusively on *Salinas*, respondents and the court below simply fail to come to grips with the vital distinctions that show why *Salinas* does not answer the question posed here.

First, neither respondents nor the Seventh Circuit acknowledged that the Court's opinion actually emphasized that Salinas *was* one of the "managers" of the corrupted enterprise (the county jail). Therefore, he was subject to criminal liability for conspiracy to violate Section 1962(c) under the "operation or management" test we are supporting.

Second, neither respondents nor the court below recognized the importance of the fact that *Salinas* was a criminal case, while this case concerns the scope of *civil* liability under RICO. As this Court's recent ruling in *Beck* v. *Prupis*, *supra*, makes clear, principles of criminal conspiracy law cannot simply be transposed to define the boundaries of liability in a civil RICO conspiracy case. Indeed, the Court explicitly rejected the attempt to make *Salinas* control the outcome there. The Court explained that the "conjunction" between the conspiracy language in Section 1962(d) and the civil treble-damage authorization in Section 1964(c) requires resort to the "law of civil conspiracy" to define the scope of liability. Slip op. at 7, n.6. Respondents never even mention this recent decision.

Thus, they invoke *Salinas* for the proposition that "no overt act is required" to establish a RICO conspiracy. Opp. 12. That statement is correct for RICO *criminal* prosecutions. But in *Beck*, this Court relied on "the well-established common law of civil conspiracy" (slip op. at 6) in concluding that, to establish a *civil* violation of Section 1962(d), commission of a predicate act defined in RICO is indispensable. Thus, any civil RICO conspiracy claim depends on proving the equivalent of a completed tort under common law. *Id.* at 7. But *Reves* holds that an outsider in the posture of these petitioners bears no civil liability under Section 1962(c) for the completed tort.

Third, as this Court made clear in *Salinas* and again in *Beck*, general conspiracy principles are relevant only to the extent that they generate a presumption about congressional intent. *Salinas*, 118 S. Ct. at 476-77; *Beck*, slip op. at 6-7. But we know from *Reves* that Congress intended to exclude outside "facilitators" from substantive liability under Section 1962(c). Other conclusions about congressional intent, also based on long-established principles, follow from that knowledge.

For example, courts have recognized in many different contexts that, when Congress specifically excludes a class of persons from substantive liability, those persons are also excluded from "conspiracy" liability. See Pet. 20-21. Respondents do not deny the existence of this principle. As we explained in our Petition, these principles draw special force from limitations that were well settled in antitrust conspiracy law, which exempted outsiders such as lawyers from "conspiracy" liability for simply "facilitating" an alleged antitrust violation.[4]

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[4] Respondents argue that "there is no basis for wholesale importation of antitrust principles into RICO cases." Opp. 17. But they concede that "RICO § 1964(c), the section that provides for private civil remedies * * * was modeled on the Clayton Act." *Ibid.* Moreover, as this Court's recent decision in *Beck* makes clear, determination of civil liability for conspiracy to violate RICO requires a court "to

3. In *Beck* the Court endorsed another important concept on which our Petition rests — that there is no reason to believe that Congress intended to create vicarious liability in civil cases for outside "conspirators" when persons in this category would, under *Reves*, have no vicarious liability for aiding and abetting an actual violation of Section 1962(c).

As the Court noted in *Beck*, civil conspiracy at common law was not an independent cause of action, but was merely "a means of establishing vicarious liability for the underlying tort." Slip op. at 9 (quoting *Halberstam* v. *Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983)). Since civil conspiracy law is simply a predicate for imposing vicarious liability, it is useful to examine a related doctrine of vicarious liability — aiding and abetting — in discerning congressional intent here. At common law, accessory liability was one of a group of related concepts (including conspiracy) developed to describe the circumstances under which a third party may bear vicarious liability for facilitating or encouraging a tortfeasor's wrongful act. See RESTATEMENT (SECOND) OF TORTS § 876. Both accessory liability and conspiracy liability are defined in similar terms — agreeing to "aid" or "facilitate" the wrongful conduct.

The Petition explained why the parallels between accessorial liability and conspiracy liability support the conclusion that Congress intended to provide parallel treatment for both those who merely "facilitate" and those who merely "*agree* to facilitate" a RICO violation — but do so without personally participating or agreeing to participate in conducting the affairs of the enterprise. *Reves* established that there is no vicarious liability for merely aiding or facilitating the conduct of the managers or operators of the enterprise. So a similar result should follow under "conspiracy" principles.

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analyze §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone." Slip op. at 7, n.6. This observation confirms that civil antitrust conspiracy law is a persuasive source of guidance.

Respondents term this a "logically unwarranted leap" (Opp. 13), but their only response is to dispute that "conspiracy and accomplice theory are virtually the same." Opp. 14. Of course, there are differences. But respondents — like the court below — never identify any reason why any technical differences would have led Congress to preclude vicarious liability for *facilitating* the operation or management of a RICO enterprise, but to authorize it for merely *agreeing* to facilitate that conduct. Applying traditional civil common law concepts, therefore, the legislative judgment to limit the scope of vicarious liability for aiding and abetting also prevents claimants from using the "conspiracy" label to expand the class of persons liable for damages under RICO.

4. Moreover, in *Beck* the Court explicitly reserved a question subsumed by our Petition. The Court explained that it was not deciding whether a civil conspiracy claim "must be predicated on an *actionable* violation of §§ 1962(a)-(c)" or whether it is sufficient to show "an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused * * * injury." Slip op. at 12 n.10 (emphasis original). The Petition provides the occasion to address that question by determining whether an alleged conspirator can be held liable even without committing, or being able to commit, "an *actionable* violation" of Section 1962(c).

Finally, as *Beck* illustrates, "ordinary conspiracy principles" are not monolithic, but must be discerned and applied in specific contexts. Thus, *Salinas* – which applied certain aspects of *criminal* conspiracy law to decide a specific issue – does not dictate the answer to the question presented. Defining the contours of *civil* liability for conspiracy to violate RICO involves important practical questions for courts and litigants and warrants definitive action by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROGER L. TAYLOR
THOMAS E. DUTTON
JILL C. ANDERSON
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Petitioner
Raffensperger, Hughes & Co.

PHILIP ALLEN LACOVARA
Counsel of Record
JAMES D. HOLZHAUER
MIRIAM R. NEMETZ
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioners
Barnes & Thornburg and
Catherine L. Bridge

WILLIAM P. WOODEN
MARY TITSWORTH CHANDLER
Wooden & McLaughlin, LLP
1600 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

LAUREN J. ROSENBLUM
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019

Additional Counsel for Petitioners
Barnes & Thornburg and Catherine L. Bridge

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